No. _____

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1997

MICHAEL C. BRICKHOUSE,

Petitioner,

vs.

JONATHAN CORPORATION, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err in deciding that the Petitioner was not injured on a covered situs under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., where the injury occurred in a facility which adjoined the navigable waters of the United States, and which customarily engaged in the building of component parts for, and loading of, vessels?

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Decision of the Benefits Review Board, United States Department of Labor, dated December 20, 1996: Michael C. Brickhouse v. Jonathan Corporation and Crawford & Company, BRB Nos. 95-1556; 96-1278 (December 20, 1996) (App. 21).

Decision of the United States Court of Appeals for the Fourth Circuit entered on April 23, 1998: Jonathan Corporation v. Michael C. Brickhouse and Director, Office of Workers' Compensation Programs, United States Department of Labor, Nos. 96-2457; 97-1039, 142 F.3d 217 (4th Cir. 1998) (App. 1).

STATEMENT OF JURISDICTION

This case arose under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. (the "LHWCA" or the "Act"). The Administrative Law Judge had jurisdiction to hear the claim pursuant to 33 U.S.C. §§ 919 (c) & (d). The Benefits Review Board had jurisdiction to hear the appeal from the Administrative Law Judge's decision, pursuant to 33 U.S.C. § 921 (b) (3). Jurisdiction was proper before the United States Court of Appeals for the Fourth Circuit upon petition for review from the Benefits Review Board, pursuant to 33 U.S.C. § 921 (c).

The United States Court of Appeals for the Fourth Circuit rendered its decision in this case on April 23, 1998. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fourth Circuit by way of *certiorari* pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS

This case involves the interpretation of 33 U.S.C. § 903 (a), which states as follows:

> Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

STATEMENT OF THE CASE

Petitioner, Michael C. Brickhouse ("Brickhouse"), was injured on August 14, 1993 while working for Tidewater Steel Company ("Tidewater"), which is a wholly-owned subsidiary of Jonathan Corporation ("Jonathan"). The Tidewater Steel facility at which he was injured sits on a 90-acre site. It is situated on land that is bounded by, contiguous with, and adjacent to, the Southern Branch of the Elizabeth River, a navigable waterway. The facility is an 800 by 100 foot building divided into three bays. One of the three bays at the facility is

devoted exclusively to shipbuilding and shipboard projects. Brickhouse was injured in one of the other bays of the facility, where he was performing welding on a railroad bridge project.

The record below reveals that small completed projects are carried out by rail or truck from the Tidewater Steel facility, while various shipboard projects manufactured for Jonathan are loaded onto, and shipped out by, barges from the facility. The facility produces heavy fabricated units, such as flight decks, which are taken from the facility by barge and installed on ships. The facility is used at times for loading vessels.

Brickhouse sought compensation for his work-related injury under the LHWCA. Jonathan disputed the existence of jurisdiction under the Act, arguing that Brickhouse did not meet the Act's situs and status requirements. The matter was heard before Administrative Law Judge Daniel A. Sarno, Jr. of the United States Department of Labor ("Judge Sarno"). On April 25, 1995, Judge Sarno issued a Decision and Order in which he held that the Petitioner's claim met both the status and situs requirements of the Act. (App. 32).

Jonathan appealed Judge Sarno's decision to the Benefits Review Board. In an opinion dated December 20, 1996, the Benefits Review Board affirmed Judge Sarno's decision that the Petitioner met the requirements of both the situs and status tests under the Act. (App. 21).

Upon Jonathan's petition for review to the Court of Appeals for the Fourth Circuit, the court reversed the decision of the Benefits Review Board on the basis that the Petitioner did not establish that his injury occurred on a covered situs under the Act, stating as follows:

> [Brickhouse] was fabricating [steel parts] in a steel fabrication plant which was not a pier, wharf, dry dock, terminal, building way, or marine railway. Nor was it, we conclude, a similar type of facility that fits the catchall provision. While at the plant, the employees' work did not routinely take them from within the plant, onto adjoining water, and back again into the plant. On the contrary, when at the plant, their work kept them in the plant to fabricate steel components that were shipped from the plant, usually by rail or truck, either to an inland site or to a ship in navigable waters for installation. The very fact that it was necessary for the components to be shipped from the plant before their installation, whether by ship or not, provides the fact that insulates the plant from navigable waters and distinguishes Brickhouse's work location from

> that of the traditional workplace at the water's edge . . . .

(App. 17-18). The Court then opined that the fact that the plant's property was contiguous with the Elizabeth River was simply "fortuitous", stating as follows:

> The plant was not connected to the Elizabeth River in any way necessary to make workers in the plant longshoremen working at the water's edge. Indeed, the plant was almost a thousand feet from the water's edge, and it was not "customary" for the plant's workers to move between land and water in any regular way. They remained in the plant fabricating maritime and non-maritime components, just as they would have done if the plant were located on any inland site.
>
> Stated otherwise, the steel fabrication plant where Brickhouse was injured was not a facility, the "*raison d'être* of which is its use in connection" with the nearby navigable waters. See Sidwell, 71 F.3d at 1139. The plant did not serve ships at the water's edge. Indeed,

there is no evidence that Tidewater Steel ever repaired, dismantled, or built a ship at its barge dock on the Elizabeth River. Rather, it served ships at other locations by manufacturing components at its plant and shipping them from the plant to the other locations. Moreover, the fact that components were, on rare occasions, shipped by barge from Tidewater Steel's dock is not meaningful. The barge dock on Tidewater Steel's property would be relevant only if barges were the "customary" method of shipment and if its employees were longshoremen who customarily loaded the barge at the facility. See 33 U.S.C. § 903 (a). But the evidence in the record is insufficient to draw either conclusion.

(App. 18-19).

Based on the foregoing analysis, the Fourth Circuit determined the Brickhouse was not injured on a covered situs. Brickhouse now seeks this Court's review of the Fourth Circuit's decision that he did not meet the situs requirement of the Act.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit Court of Appeals' decision in this case conflicts with the decisions of other United States courts of appeals on the issue of jurisdiction under the Longshore and Harbor Workers' Compensation Act.

A maritime employee is entitled to coverage under the LHWCA where he or she is injured

> upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903 (a) ("Section 903 (a)"). The parenthetical language in Section 903 (a) is the result of a 1972 amendment to the Act. Congress, recognizing the need to provide uniformity where workers who travel in and out of coverage, added the parenthetical language to Section 903 (a) in 1972 to expand the scope of coverage under the Act landward. According to the Senate and House Committee Reports, the amendment was intended "to permit a uniform compensation

system to apply to employees who would otherwise be covered by this act for *part* of their activity." S. Rep. No. 92-1125, 92nd Cong., 2d Sess. 12-13 (1972) (emphasis added); H.R. Rep. No. 92-1141, 92nd Cong., 2d Sess. (1972) (emphasis added), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4707-08. Congress was aware that modern longshoring techniques involved an increased amount of work on land, and believed that "compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water." Id. In essence, Congress sought to provide a seamless blanket of coverage for all longshoring activities. S. Rep. No. 92-1125 at 13; H.R. Rep. No. 92-1441 at 10-11; Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 263 (1977). Thus, it expanded the geographical scope of the Act, meaning that land-based activities could also be covered under the Act.

In addition to expanding the geographical scope of coverage under the Act, Congress specified the classes of workers entitled to coverage in Section 902 (3) of the Act. 33 U.S.C. § 902 (3); Caputo, 432 U.S. at 262 (1977). In so doing, Congress changed what previously had been only a "situs" test to one which considers both the "situs" of the injury and the "status" of the injured employee. Caputo, 432 U.S. at 264. The "status" test is governed by the definition of

"employee" found in Section 902 (3) of the Act. The "situs" test is governed by Section 903 (a), and focuses on the location at which the injury occurs and its relationship to the navigable waters of the United States. In the immediate case, the Fourth Circuit did not reach the status issue, as it determined that its decision on the situs issue was dispositive of the appeal. Accordingly, only the situs requirement is at issue in this Petition.

This case follows a line of decisions by the United States Court of Appeals for the Fourth Circuit dealing with the issue of situs jurisdiction, in which the Fourth Circuit has created a test for situs jurisdiction that conflicts with the decisions of other circuit courts of appeals. See Sidwell v. Express Container Serv., Inc., 71 F.3d 1134 (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996); Parker v. Director, OWCP, 75 F.3d 929 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 58 (1996); Kerby v. Southeastern Public Service Authority of Virginia, Nos. 97-1323, 97-1373, 1998 U.S. App. LEXIS 2965 (4th Cir. Feb. 24, 1998), *petition for writ of cert. filed*, May 22, 1998. In each of the foregoing decisions, the Fourth Circuit addressed the meaning of the phrase "other adjoining areas" which appears in Section 903 (a), and employed a strict interpretation of that phrase for determining jurisdiction under the Act. The Fourth Circuit's construction of the phrase "other

adjoining areas" is much more stringent than the interpretations of its sister circuits.

Unlike the Fourth Circuit's previous decisions on the issue of situs jurisdiction, the present case deals with a parcel of land which is unquestionably contiguous with, and adjacent to, a navigable waterway. Consistent with its previous over-restrictive interpretation Section 903 (a), however, the Fourth Circuit, in the matter at bar, has now created a stringent rule as to what activity amounts to "customary use" by an employer in loading, unloading, repairing, or building a vessel. The issue, therefore, is not whether the site "adjoins" navigable waters, but whether the site meets the qualifying language that requires adjoining areas to be "customarily used" by the employer in "loading, unloading, repairing, dismantling, or building a vessel." If the Fourth Circuit is applying a test to determine what constitutes customary use that conflicts with the decisions of its sister circuits, it stands to reason that the intent of the amendment, to provide for uniformity of coverage, is being thwarted.

Unlike the Fourth Circuit, other circuits that have dealt with areas that are not physically adjacent to navigable waterways have applied a "functional" approach for purposes of determining whether a parcel of land qualifies as an "other adjoining area" under the Act. Under this approach, the

relationship of the area in question with the navigable waterway is studied in order to determine whether it falls within the Act. This test is illustrated in the Ninth Circuit Court of Appeal's opinion in Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978) ("Herron"). In Herron, the Ninth Circuit interpreted the phrase "other adjoining area" as describing a "functional relationship that does not in all cases depend upon physical contiguity." 568 F.2d at 141. To determine whether a particular site qualifies as a covered situs, the court in Herron created a test which considers the following factors: (1) the particular suitability of the site for the maritime uses referred to in the statute; (2) whether adjoining properties are devoted primarily to uses in maritime commerce; (3) the proximity of the site to the waterway; and, (4) whether the site is as close to the waterway as is feasible given all of the circumstances. Id. Applying this "functional" test, the Ninth Circuit held that the claim of a gear lockerman who was injured while unloading steel from a truck parked at a gear locker located 2,600 feet north of the edge of the Columbia River and 2,050 feet outside of the entrance gate of the port met the situs requirement under the Act.

After Herron, the Fifth Circuit decided the case of Texports Stevedore Co. v. Winchester, 632 F.2d 504 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), in which it found

that a "gear man" who was injured while working in a gear room located five blocks from the gate of the nearest dock, was injured on a covered situs. Citing its opinion in Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176 (5th Cir. 1977), *cert. denied*, 434 U.S. 903 (1977), the Winchester court held that the physical distance from the water is not the decisive issue on the question of whether a situs qualifies under the Section 903 (a). Instead, according to the court, the question is whether the situs is within a contiguous area used for a purpose delineated in the coverage provisions of the Act. The court rejected the position that the presence of nonmaritime buildings between the point of injury and the waterfront is dispositive, reasoning that such a rule would introduce a new fortuity that would frustrate congressional intent. Id. at 513.

Later, the Court of Appeals for the Second Circuit decided the case of Triguero v. Consolidated Rail Corp., 932 F.2d 95, 100-01 (2d Cir. 1991). In that case, the court relied on Winchester and Herron in support of its holding that a claimant whose injury occurred over a mile from the employer's dockside facility, in a container yard separated from navigable waters by a public street, met the situs requirement of Section 903 (a). The court determined that the distance from a navigable waterway by roads or property boundaries is not

dispositive in the situs inquiry. Id.

Although the foregoing decisions relate to parcels of land that are separated from navigable waters, they are significant in the matter at bar because they show that the distance from the waterway is consistently viewed in other circuits as unimportant where there is a functional relationship between the land on which the claimant is injured and the waterway. Notably, each of the cases cited involves an area of land located further from navigable water than the place at which Brickhouse was injured.

The Fourth Circuit, rejecting the decisions of the Fifth and Ninth Circuits, held, in Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996), that a claimant who suffered an injury at a container repair facility was not injured on a covered situs. The facility had been relocated to an off-terminal site from a site immediately adjoining the terminal, due to the terminal's expansion. Because the off-terminal site was not immediately contiguous with a navigable waterway, the court determined that situs jurisdiction did not exist. It reasoned that each of Section 903 (a)'s enumerated "areas" "is a discrete structure or facility, the very *raison d'être* of which is its use in connection with navigable waters." Id. at 1139. Thus, according to the Court, an area must be a discrete shoreside structure or facility

which is "customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel" in order to qualify as an "other area" under the Act. Id.

In the present case, unlike Sidwell, there is no question of property lines; it is undisputed that the land on which the facility is situated adjoins the navigable waters of the United States. Yet, in reaching its decision in this case, the Fourth Circuit employed its reasoning in Sidwell to hold that the Tidewater Steel facility is not a "discrete structure or facility, the very *raison d'être* of which is its use in connection with navigable waters" and therefore falls outside of the Act's jurisdictional reach. While the foregoing language was surplusage in Sidwell, since the real issue in that case was the separation of the site in question from the terminal, its use in the present case has greater implications. The result is a harsh and unduly rigid rule that an area must exist for the sole purpose of loading, unloading, repairing, dismantling, or building a vessel in order for it to qualify for coverage; a rule which conflicts with Congressional intent and the decisions of the other circuit courts.

The severity of the Fourth Circuit rule in this case becomes evident upon a review of the three factors upon which the court based its decision, and a comparison of these factors to the decisions of the other circuits. The three factors upon

which the Fourth Circuit based its decision were: (1) the employees' work did not routinely take them from within the plant onto adjoining water and back again into the plant; instead, the work involved the fabrication of steel components which were shipped usually by rail or truck; (2) the plant was "almost a thousand feet from the water's edge"; and, (3) the plant did not serve ships at the water's edge; there was no evidence that Tidewater Steel ever repaired, dismantled, or built a ship at its barge dock on the Elizabeth River. Rather, it served ships at other locations by manufacturing components at its plant and shipping them from the plant to the other locations. This demonstrates that, in the Fourth Circuit, in order for an area which adjoins navigable waters to meet the "customarily used" requirements of Section 903 (a), the following are required: (1) routine or customary movement by workers between adjoining water and the situs in question; (2) location of the site within a certain (unspecified) distance from a navigable waterway; and (3) service of ships at the water's edge. As discussed below, this restrictive standard for determining customary use conflicts with the standards of the other circuits and, accordingly, this Court's resolution is necessary.

In Alford v. American Bridge Division, United States Steel Corp., 642 F.2d 807 (5th Cir. 1981), *modified*, 668 F.2d

791 (1981), *cert. denied*, 455 U.S. 927 (1982), the Fifth Circuit held that a steel fabrication facility which was located on navigable waters was a covered situs under the Act. The facility in question was formerly a shipyard, but had not launched a vessel for nearly ten years. Id. at 809. Its primary function since that time had been to fabricate steel components of larger structures, including bridges, steel buildings, power plants and vessels. Id. When large modules for vessels weighing several tons were completed and shipped, they were loaded onto barges to be sent by sea to New York or Newport News Shipbuilding in Virginia. Id. At the time of the claimant's injury five projects were underway at the facility, only two of which were maritime in nature. Id. at 810.

In Alford, the court held that the facility's location on the water was not incidental, as the company's witness testified that there was no other reasonable way to transport the large vessel modules except by water. Id. at 813-814. The court rejected the employer's argument that Section 903 (a) requires the presence of a vessel to meet the situs test. The congressional intent, according to the court, was to adapt coverage to an increasingly modernized and technological society. Products which were once produced from start to finish in one plant are now contracted out to specialized manufacturers and then shipped to a final assembly point.

"Present day realities and a changing economy have altered the picture of the traditionally centrally located American Shipyard operation into an 'ongoing process of shipbuilding' scattered about on the navigable waterways of the continent." Id. On that basis, the court held that the fact that component parts were fabricated at the plant and shipped elsewhere was not decisive of the situs issue. Id.

Alford followed a previous Fifth Circuit opinion, Alabama Dry Dock and Shipbuilding Co. v. Kininess, 554 F.2d 176 (5th Cir. 1977), *cert. denied*, 434 U.S. 903 (1977), in which the court held that the physical distance of the place of injury from the water's edge is not decisive of the situs inquiry. "The test", according to the court in Kininess, "is whether the situs is within a contiguous shipbuilding area which adjoins the water." Id. at 178. Employing this reasoning, the court held that an employee injured on a shipyard's back lot on which a gantry crane was stored was injured on a covered situs. See Perkins v. Marine Terminals Corp., 673 F.2d 1097 (9th Cir. 1982) ("There is no requirement in the Act that a facility or area be used exclusively, or even primarily, for maritime purposes for it to be a covered situs . . . , or that it be within a specified distance to the shore.") (citations omitted).

A similar result was reached by the Third Circuit in Dravo Corp. v. Maxin, 545 F.2d 374 (3d Cir. 1976), *cert.*

denied, 433 U.S. 908 (1977). In Dravo, the Third Circuit held that a structural steel fabrication shop within a facility that adjoined navigable waters fell within the ambit of the Act. The Court stated that Congress certainly was familiar with the assembly-line methods employed in American manufacturing, and that Congress' intent in extending the Act landward certainly took these types of facilities into account. Id. at 381.

Thus, the Fifth, Third and Ninth Circuits recognize that it is not necessary under the Act for the property in question to be used exclusively, or even primarily, for maritime purposes. Indeed, non-maritime work at the plant in Alford exceeded the maritime work, yet that site was still deemed to be covered under the Act. The fact that workers do not routinely move back and forth from the navigable water is therefore not decisive in those circuits. Furthermore, there is no requirement in the Third, Fifth and Ninth Circuits that the injury take place within a specified distance from the water. Finally, the fact that ships are not routinely serviced at the water's edge is not determinative of the situs issue in these circuits. The Fourth Circuit, however, in the opinion in the matter at bar, has held otherwise. It overlooks the fact that technological advances now require component parts to be fabricated and manufactured at different places and then shipped for assembly. The record below indicates that when flight decks were

shipped, they had to be sent by barge. As such, this was the customary method of shipment and it does not matter if other parts were fabricated and sent by land or rail. Finally, the Fourth Circuit ignored the basic premise that the Act is required to be liberally construed in favor of its remedial purposes.

The conflict between the Sidwell rule and those of the other circuits was made even more apparent in the Third Circuit's recent decision in Nelson v. American Dredging Co., No. 96-3724, 1998 U.S. App. LEXIS 9695 (3d Cir. May 11, 1998). In Nelson, the Third Circuit specifically rejected the reasoning of Sidwell in deciding that a claimant who was injured while working on a beach reclamation project in Delaware, which consisted of widening the beach by adding sand to it, was covered under the Act. Id. at 2. The Nelson court had the following to say concerning the BRB's reliance on Sidwell:

> We respectfully decline to adopt this construction of the statute. The structures identified in § 3 (a) which preceded the phrase "other adjoining area" were not referred to in that section as "areas." The Sidwell court opined that by using the term "other adjoining area" the drafters of the amendment thereby

> were referring back to the enumerated structures; i.e., pier, wharf, dry dock, as areas. But giving the word "area" its plain meaning as we are required to do in construing the statute, we find that it does not denote a building or structure as such, but rather an open space, indeed sometimes within a building or other structure.

Id. at 22. The court went on to note that the definition of "area" does not suggest that the drafters intended that it refer back to and be modified by any of the preceding enumerated sites which happen to be structures. Thus, the improved beach fit within the plain meaning of the word "area". Id. at 23. Under the Fourth Circuit's reasoning, the situs in Nelson would be deemed recreational and not "customarily used" for the maritime purposes set forth in Section 903 (a).

As noted above, the 1972 amendments to the LHWCA were enacted to provide for uniformity of coverage to similarly-situated workers, regardless of the judicial district in which their injuries occur. The Fourth Circuit, however, has created its own criteria for coverage which are not sanctioned by the Act and which conflict with the rulings of its sister circuits. Thus, it has created a conflict among the circuits which flies in the face of Congress' intent upon amending the

Act in 1972. Accordingly, this Court's resolution of this issue is essential.

II. The decision in this case conflicts with previous decisions of the Fourth Circuit on the issue of situs jurisdiction under the Longshore and Harbor Workers' Compensation Act.

The Fourth Circuit's decision in the present case also conflicts with its own previous decisions on the issue of situs jurisdiction. In Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978), the court held that a submarine shop located 1,200 feet from the water's edge and a foundry located 3,000 feet from the water's edge satisfied the situs test because they were "integral parts of the shipyard." Id. at 169. The court focused on the type of work performed on the sites in question, and held that it was not necessary that all of the work performed on the site be devoted to ship related work. Id. at 169 (citing Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 543 (5th Cir. 1976); Dravo Corp. v. Maxin, 545 F.2d 374, 381 (3d Cir. 1976)). Nine years later, in Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988), the Fourth Circuit held that a ship foreman, who was injured on a public street while returning to the employer's

terminal from a restaurant, was not injured on a covered situs. The court reasoned that coverage did not exist because (1) his injury occurred well over a mile from the employer's terminal; (2) the injury occurred along a public highway which did not connect any portions of the employer's terminal or traverse continuous or contiguous terminal areas; (3) although the restaurant from which the claimant was traveling was arguably located in a waterfront area, it was separated from any navigable waterway or maritime terminal by a residential neighborhood; (4) the restaurant was not the closest one to the terminal; and (5) the restaurant was not an integral part of the employer's terminal. Id. at 374-75. The court stressed that the proper inquiry in determining the situs issue is with respect to the character of the area in which the injury occurs, noting that "[i]t is generally settled that a covered situs need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime' operation." Id. at 373. (citing Perkins v. Marine Terminals Corp., 673 F.2d 1097, 1101-02 (9th Cir. 1982)). The court acknowledged in its opinion that a "broad interpretation of the maritime situs requirement is warranted on statutory and policy grounds." Humphries, 834 F.2d at 374. After Graham and Humphries, the Fourth Circuit decided the case of Sidwell. In a footnote in Sidwell, the court stated that "it is the parcel of land that

must adjoin navigable waters, not the particular square foot on which a claimant is injured." Id. at 1140, n. 11.

The Fourth Circuit's decision in the immediate case conflicts with its holdings in Graham, Humphries and Sidwell. In Graham and Humphries, the court recognized that the site in question need not be used exclusively for maritime purposes or be within a specified distance of the water. However, in the case at bar, it found these factors to be dispositive against the claimant on the issue of jurisdiction. Furthermore, despite its acknowledgement in Sidwell that the particular square foot on which the claimant is injured is not the relevant inquiry, the court in the present case found significant the fact that Brickhouse's injury occurred "nearly a thousand feet" from the water's edge, despite the fact that the parcel of land on which he was injured was undoubtedly adjacent to navigable waters. It is therefore evident that the Fourth Circuit's decision in the matter at bar stands in conflict with its previous decisions on the issue of situs jurisdiction under the Act. Thus, in addition to the split between the Fourth Circuit and its sister circuits, there exists within the Fourth Circuit conflicting authority on the issue of situs jurisdiction. This divergence of authority further demonstrates the need for a binding interpretation of the language of Section 903 (a) by this Court.

III. The interpretation of the language of Section 903 (a) involves an important question of federal law concerning jurisdiction under the Longshore and Harbor Workers' Compensation Act, that has not been, but should be, settled by this Court.

This Court has made it clear in previous decisions that the 1972 amendments to the Act created dual "situs" and "status" tests. However, this Court has yet to address the issue of what constitutes "customary" usage of a particular site for maritime purposes as required under the Act. In Director, OWCP v. Perini North River Assocs., 459 U.S. 297, 324 n. 32 (1983), this Court held that the requirements of "status" and "situs" are distinct. In Herb's Welding, Inc. v. Gray, 470 U.S. 414, 426 (1985), this Court held that neither requirement should be read to render the other superfluous.

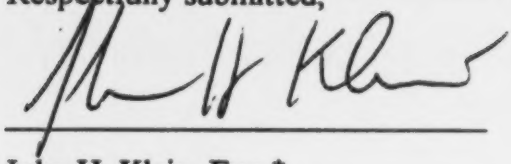
In Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977), this Court determined that the Act should be liberally construed in conformance with its remedial purposes to avoid harsh and incongruous results. Id. at 268. The situs issue was decided on the basis that the injuries in question occurred on facilities which were immediately adjacent to, and

physically touched, a navigable waterway. There was no question in Caputo as to whether the character of the situs in question met the requirements of the Act. Because the various interpretations of "customary use" of other adjoining areas has created a divergence of opinion among the circuits, this Court's intervention and resolution of the issue is paramount. Furthermore, the Act is required to be liberally construed; a rule which is being followed by the Fifth, Second, Third and Ninth Circuit, but which is being ignored by the Court of Appeals for the Fourth Circuit.

CONCLUSION

This case presents a critical jurisdictional issue which requires this Court's resolution. When Congress amended the Act in 1972, it sought to prevent disparate treatment of similarly situated workers, and to provide uniformity of coverage under the Act. That legislative intent is being thwarted by the Court of Appeals for the Fourth Circuit, where workers are now subject to a harsh jurisdictional test which workers in other circuits are not required to meet. For these reasons, the Petitioner respectfully requests that this Court take the opportunity presented in this case to settle the conflict which currently exists among the various circuits, and thereby create the much-needed uniformity that Congress intended to promote when it amended the Act in 1972.

Respectfully submitted,



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APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JONATHAN CORPORATION,

Petitioner,

v. No. 96-1457

MICHAEL C. BRICKHOUSE; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

JONATHAN CORPORATION,

Petitioner,

v. No. 97-1039

MICHAEL C. BRICKHOUSE; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

142 F.3d 217

October 30, 1997, Argued

April 23, 1998, Decided

PRIOR HISTORY: On Petitions for Review of Orders of the Benefits Review Board. (95-1556).

DISPOSITION: Petition for review granted, and judgment of the Benefits Review Board REVERSED.

COUNSEL: ARGUED: F. Nash Bilisoly, IV, VANDEVENTER, BLACK, MEREDITH & MARTIN, L.L.P., Norfolk, Virginia, for Petitioner.

John Harlow Klein, RUTTER & MONTAGNA, L.L.P., Norfolk, Virginia, for Respondents.

ON BRIEF: Kelly O. Stokes, VANDEVENTER, BLACK, MEREDITH & MARTIN, L.L.P., Norfolk, Virginia, for Petitioner.

Matthew H. Kraft, RUTTER & MONTAGNA, L.L.P., Norfolk, Virginia, for Respondents.

JUDGES: Before RUSSELL, * NIEMEYER, and WILLIAMS, Circuit Judges.

* Judge Russell heard oral argument in this case but died prior to the time the decision was filed. The decision is filed by a quorum of the panel. 28 U.S.C. § 46(d). Judge Niemeyer wrote the opinion, in which Judge Williams joined.

OPINION

NIEMEYER, Circuit Judge:

We are presented with the jurisdictional question of whether the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, et seq., covers an employee's injury sustained in a steel fabrication plant near navigable water. Coverage depends on satisfaction of a "situs" test and a "status" test. Because we conclude that the situs requirement is not met, we hold that the LHWCA does not cover the employee's injury and reverse the decision of the Benefits Review Board which ruled otherwise.

I

Michael C. Brickhouse was injured in August 1993, when a 12-foot square piece of steel fell on him while he was working for his employer, Tidewater Steel Company, a steel fabrication firm in Chesapeake, Virginia. Brickhouse was a welder who had worked for Tidewater Steel for four and one-half years. Following his injury he went to the hospital and has not returned to work.

The Tidewater Steel facility at which Brickhouse worked is an 80,000-square foot building which is divided into three bays. One bay is used exclusively to fabricate steel for Jonathan Corporation, Tidewater Steel's parent corporation, for maritime related projects, such as the repair and replacement of ship components. The other two bays fabricate steel for bridges and other non-maritime projects.

Brickhouse had, over the years, spent substantial periods of time performing welding on components for installation in ships, and on occasion he would travel to the shipyards of Jonathan Corporation to work on the components' installation. The majority of his time, however, was expended in welding on non-maritime projects in the other two bays of the Tidewater Steel facility. Jonathan Corporation contends in its brief that the work records for Brickhouse, which are in the record, demonstrate that he worked more than 75% of the time on non-maritime projects. At the time of his injury, Brickhouse was working in a non-maritime bay of the plant on a railroad bridge that was to be shipped to Concord, North Carolina.

The property on which the Tidewater Steel facility is situated is contiguous to the Southern Branch of the Elizabeth River, a navigable waterway, and the property has a dock for loading barges. Tidewater Steel, however, receives all of its steel by rail or truck, and likewise ships out most of its fabricated product by rail or truck. From time to time, when components are especially large, it ships them by barge. The record reveals, for example, that on at least one occasion, the company shipped components of a flight deck by barge to a navy shipyard for installation on a navy ship.

In response to Brickhouse's claim for workers compensation under the LHWCA, Jonathan Corporation challenged coverage of the Act, contending that Brickhouse was not, at the time of his injury, on "navigable waters of the United States," as required by U.S.C. § 903(a), and that he was not engaged in "maritime employment," as required by *33 U.S.C. § 902*(3). These requirements refer to "situs" and "status" requirements for jurisdiction, both of which must be satisfied. *See Director, OWCP v. Perini N. River Assocs.*, 459 U.S. 297, 314, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983*); Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 265, 279, 53 L. Ed. 2d 320, 97 S. Ct. 2348 (1977); *Pittman*

Mech. Contractors v. Director, OWCP, 35 F.3d 122, 125 (4th Cir. 1994).

The ALJ found that both situs and status requirements were satisfied in this case. In finding the situs requirement met, he observed that the plant was located on a navigable waterway which was used on occasion to ship heavy prefabricated steel, such as flight decks, for installation on ships. While the ALJ assumed that the majority of the plant's work was committed to the fabrication of non-maritime steel products shipped by rail or truck, he observed that a "significant amount of its work is maritime related." The ALJ concluded:

> [T]he evidence of record establishes Claimant's injury took place in an adjoining area to a navigable waterway, the South Branch of the Elizabeth River. The adjoining area is the Tidewater Steel facility in Chesapeake, Virginia. That location is used by the employer in loading and unloading vessels. Consequently, Claimant has established the situs requirement.

In finding the status requirement met, the ALJ held that a claimant "need not be engaged in maritime employment at the time of the relevant injury" and that a claimant "who regularly performs duties relating to maritime employment should not be denied coverage if injured while temporarily performing some non-maritime activity." He concluded that a "significant amount" of Brickhouse's work was maritime in nature because he welded on components intended for installation in ships, because he sometimes installed components on ships, and because he sometimes worked at amphibious bases and at shipyards. The ALJ thus concluded that, even though the claimant was working on non-maritime work at the time of his injury, "he is one of those employees who can walk in and out of maritime activity at the whim of his employer."

Having found both the situs and status requirements satisfied, the ALJ concluded that Brickhouse was an employee covered by the LHWCA. The Benefits Review Board affirmed, and this appeal followed.

II

Until 1972, the Longshoremen's and Harbor Workers' Compensation Act ("Longshoremen's" remained in the Act's title until 1984 when it was changed to "Longshore") provided coverage for injuries occurring only "upon the navigable waters of the United States (including any dry dock)." *33 U.S.C. § 903* (1970 ed.). If an injury occurred on a pier adjoining navigable waters, it occurred on the land side of jurisdiction, and coverage of the Act was denied. See *Nacirema Operating Co. v. Johnson, 396 U.S. 212, 223-24, 24 L. Ed. 2d 371, 90 S. Ct. 347 (1969).* The "line of demarcation" between land and water defined the line between coverage of the Longshoremen's and Harbor Workers' Compensation Act and coverage of state workers' compensation laws. *Director, OWCP v. Perini N. River Assocs.*, 459 U.S. 297, 316, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983). "As a consequence, longshoremen continually walked in and out of LHWCA coverage as they walked up and down the gangplank from ship to shore during the loading and unloading of vessels." *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1135 (4th Cir. 1995) (citing S. Rep. 92-1125, 92nd Cong., 2d Sess. 12-13 (1972)). In Nacirema, the Supreme Court stated that any invitation "to

move that line [of jurisdiction] landward must be addressed to Congress, not to this Court." 396 U.S. at 224. As the Court later observed, "In 1972, Congress moved the line." *Caputo*, 432 U.S. at 260.

The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act moved the line landward by including in the definition of navigable waters "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." *33 U.S.C. § 903*(a). In so moving the line, however, Congress recognized that non-maritime employees would be included within coverage under a pure situs test. Consequently, it also limited the class of employees covered by defining employee to mean "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." *33 U.S.C. § 902*(3).

One of Congress' principal purposes in moving the coverage line landward was to provide more uniform coverage for longshoremen as they loaded and unloaded

ships and repaired them. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426, 84 L. Ed. 2d 406, 105 S. Ct. 1421 (1985); *Caputo*, 432 U.S. at 272. It made little sense that a longshoreman injured at one end of a gangplank was covered, while at the other end, he was not covered, even though he was doing the same job. Also, with the advent of containerization and other modern loading techniques, much of the loading and unloading work was done on the pier adjacent to the ship. *See Caputo*, 432 U.S. at 269-70. Thus, Congress believed that coverage for a person who did traditional longshoremen's work both on the water and on the adjacent land should not depend on where the person was standing in relation to the water's edge when injured. *See id.* at 272.

With the 1972 amendments, the test for coverage thus changed from a simple situs test to a test incorporating situs and status requirements. Even with the new situs boundary moved landward, however, the situs requirements still establish a geographical boundary for coverage. *See Herb's Welding*, 470 U.S. at 427; *Caputo*, 432 U.S. at 264. As with any geographical boundary, workers can still move across that boundary into and out of the Act's coverage. See *Herb's Welding*, 470 U.S. at 426 ("There will always be a boundary

to coverage, and there will always be people who cross it during their employment."); *Humphries v. Director, OWCP*, 834 F.2d 372, 373-74 (4th Cir. 1987). The question now, however, is where the geographical boundary for coverage of the LHWCA runs and, more particularly, whether it includes the location where Brickhouse was injured.

Jonathan Corporation contends that the boundary does not encompass the situs where Brickhouse was injured. It notes that he was injured while fabricating steel for an inland bridge in a steel fabrication plant located "approximately 1,000 feet from the Elizabeth River." It argues that Brickhouse's work area is not "contiguous with a navigable waterway" and that the facility in which he was working was not "like a pier, wharf, dry dock, terminal, building way, or marine railway. . . . Tidewater Steel is a plant where heavy steel is fabricated." It argues further that the Tidewater Steel plant was not customarily used for loading, unloading, repairing, dismantling, or building a vessel. It notes that Tidewater Steel did not even have a shoreside crane that could be used for those purposes at the water's edge of its property.

Brickhouse, arguing for coverage, states that the Tidewater Steel facility is contiguous to navigable waters because the plant's property extends to the water's edge. He argues, moreover, that Tidewater Steel has in fact loaded fabricated steel onto barges from its property. Finally, he notes that one entire bay of the Tidewater Steel facility is dedicated to the fabrication of ship-bound components.

Because the facts relating to the resolution of the situs issue are not substantially in dispute, coverage becomes a question of law which we determine de novo. The Board's adjudicatory interpretations of the LHWCA are thus not entitled to deference but rather are subject to our independent review. *See Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18, 66 L. Ed. 2d 446, 101 S. Ct. 509 (1980); *Pittman Mech. Contractors v. Director, OWCP*, 35 F.3d 122, 125 (4th Cir. 1994).

The situs requirement of the LHWCA limits coverage only to injuries

> occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way,

> marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel).

33 U.S.C. § 903(a). In extending the line of coverage landward, Congress thus defined navigable waters to include certain land areas "adjoining" the navigable waters.

The landward extension is a seamless annexation of land to navigable waters for purposes of LHWCA coverage. *See Caputo*, 432 U.S. at 263. But the annexation does not include all adjacent land. The statute extends "navigable waters" only to land relating to work on those waters, specifically enumerating adjoining piers, wharfs, dry docks, terminals, building ways, and marine railways. See *33 U.S.C. § 903*(a). These are facilities customarily used by longshoremen in loading and unloading ships and in repairing or building them. *See Caputo*, 432 U.S. at 271 n.32. The link between the navigable waters and the land side facilities is thus established under the statute by (1) the contiguity of the land side facility and navigable water, and (2) the affinity of the land side facility to longshoremen's work on ships.

Anticipating that its enumeration of land side facilities might not be complete, Congress also incorporated a catchall term in § 903(a) to include any "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." *33 U.S.C. § 903*(a). But again, Congress did not abandon its legislating principle of connecting this "other area" to the work of longshoremen on navigable waters. The "other area" annexed to navigable waters by the Act must again be "adjoining" the water and must again be linked to the traditional longshoremen's work on the water. The "other area" must be for the loading or unloading of cargo onto ships in navigable waters or for the "repairing, dismantling, or building" of those ships. Id.

In the foregoing manner, Congress was careful to address the problem of a longshoreman walking into and out of jurisdiction at water's edge as he performed traditional longshore work on and off ships in navigable waters. It did so by drawing a new line of demarcation landward. See, e.g., *Caputo,* 432 U.S. at 266 n. 27 (quoting legislative reports).

These principles are mostly established in our circuit. In *Sidwell*, we noted that land is made part of navigable waters for purposes of LHWCA coverage "only if it 'adjoins' navigable waters, that is, if it is 'contiguous with' or otherwise 'touches' such waters." 71 F.3d at 1138-39. While the problem presented in *Sidwell* did not require us to address the nature of land side facilities that the LHWCA covers, we did observe the controlling principle that the kinds of property that the LHWCA enumerates are "discrete structures or facilities, the very raison d'etre of which is [their] use in connection with navigable waters." Id. at 1139; *see generally Humphries*, 834 F.2d at 375 ("The LHWCA requires us to draw a spacial line for coverage under the Act").

The situs test, in sum, is a geographical one, and even though a longshoreman may be performing maritime work, if he is not injured within the land area specified by the statute, he is not covered by the Act.

Consistent with these principles, we have held that when a longshoreman moved out of coverage, even momentarily, leaving a shoreside facility in a car to pick up food for his fellow workers, he was not covered by the LHWCA when he was injured during that momentary

departure. *See Humphries*, 834 F.2d at 375. When Congress addressed a longshoreman's moving into and out of coverage at water's edge as he unloaded a ship or repaired it, Congress did not purport to eliminate the phenomenon of moving into and out of coverage -- such a condition necessarily attends any geographical boundary of coverage. *See Herb's Welding*, 470 U.S. at 426-27 (noting that there always will be a boundary of coverage which people cross during their employment). Rather, it moved the line landward only to lessen the irrationality of a line at water's edge where coverage depended on which end of the gangplank a longshoreman was injured. *See id.; Caputo, 432 U.S. at 272.*

With these principles in hand, we may readily apply them to the case before us. At the time of his employment, Brickhouse was fabricating steel parts for an inland bridge in North Carolina. He was fabricating them in a steel fabrication plant which was not a pier, wharf, dry dock, terminal, building way, or marine railway. Nor was it, we conclude, a similar type of facility that fits the catchall provision. While at the plant, the employees' work did not routinely take them from within the plant, onto adjoining water, and back again into the plant. On the contrary, when at the plant, their work kept them in the plant to fabricate steel components that were

shipped from the plant, usually by rail or truck, either to an inland site or to a ship on navigable waters for installation. The very fact that it was necessary for the components to be shipped from the plant before their installation, whether by ship or not, provides the fact that insulates the plant from navigable waters and distinguishes Brickhouse's work location from that of the traditional longshoreman's workplace at the water's edge. When Brickhouse worked on ships, which he occasionally did, he traveled by land to the shipyards where he then installed fabricated parts. During these times, he was undoubtedly on a situs covered by the LHWCA. But while at the Tidewater Steel plant, his situs was no different than it would have been at any steel fabrication plant anywhere in the land.

Brickhouse argues that the fact that the Elizabeth River runs contiguous to the plant's property satisfies the situs requirement. That fact, however, is simply fortuitous. The plant was not connected to the Elizabeth River in any way necessary to make workers in the plant longshoremen working at the water's edge. Indeed, the plant was almost a thousand feet from the water's edge, and it was not "customary" for the plant's workers to move between land and water in any regular way. They remained in the plant

fabricating maritime and non-maritime components, just as they would have done if the plant were located at any inland site.

Stated otherwise, the steel fabrication plant where Brickhouse was injured was not a facility, the "raison d'etre of which is its use in connection" with the nearby navigable waters. *See Sidwell*, 71 F.3d at 1139. The plant did not serve ships at the water's edge. Indeed, there is no evidence that Tidewater Steel ever repaired, dismantled, or built a ship at its barge dock on the Elizabeth River. Rather, it served ships at other locations by manufacturing components at its plant and shipping them from the plant to the other locations. Moreover, the fact that components were, on rare occasions, shipped by barge from Tidewater Steel's dock is not meaningful. The barge dock on Tidewater Steel's property would be relevant only if barges were the "customary" method of shipment and if its employees were longshoremen who customarily loaded the barge at the facility. *See 33 U.S.C. § 903*(a). But the evidence in the record is insufficient to draw either conclusion.

Because we conclude that at the time of his injury, Brickhouse was not on a situs covered by the LHWCA, we

need not address the more complex question of whether Brickhouse was injured while engaging in maritime employment. *See, e.g., Herb's Welding*, 470 U.S. at 425 (observing, "we have never read 'maritime employment' to extend so far beyond those actually involved in moving cargo between ship and land transportation" to include a claimant who was a welder, and thus a welder, without more, "was not engaged in maritime employment"). The petition for review is granted, and the judgment of the Benefits Review Board is

REVERSED.

Decision of the Benefits Review Board, United States Department of Labor, dated December 20, 1996: Michael C. Brickhouse v. Jonathan Corporation and Crawford & Company (BRB Nos. 95-1556, 96-1278) (December 20, 1996).

UNITED STATES DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

BRB Nos. 95-1556 and 96-1278

MICHAEL C. BRICKHOUSE,
Claimant-Respondent,

v.

JONATHAN CORPORATION,

and

CRAWFORD & COMPANY,

Employer/Carrier-
Petitioners.

DATE ISSUED: DEC. 20, 1996

DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits of Daniel A Sarno, Jr., Administrative Law Judge, United States Department of Labor, and the Order Designating Authorized Treating Physician of B. B. Voultsides, District Director, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly 0. Stokes (Vandeventer, Black, Meredith & Martin), Norfolk, Virginia, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order - Awarding Benefits (94-LHC-1330) of Administrative Law Judge Daniel A Sarno, Jr., and the Order Designating Authorized Treating Physician (Case No. 5-89883) of District Director B. Voultsides rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Consequently, the only appeal pending in this matter is employer's appeal of the administrative law judge's Decision and Order, BRB No. 95-1556. Arguably, since employer filed a motion to withdraw the consolidated case prior to September 12, 1996, the original May 25,1995 appeal date should apply, in which case the administrative law judge's decision could be administratively affirmed pursuant to Public Law No. 104-134, since this appeal was more than one year old on September 12, 1996. However, in view of the consolidation of the two appeals and our

order stating that employer's second appeal extended the period of review until June 26, 1997, we will consider the issues raised by employer in its appeal of the administrative law judge's decision.

In its appeal of the administrative law judge's decision, employer contends that the administrative law judge erred in finding situs and status. Specifically, employer asserts that since claimant's injury occurred in a portion of the facility devoted to non-maritime uses, claimant was not injured in an "adjoining area" under Section 3(a). Employer further argues that the status test was not met since the vast majority of claimant's work was non-maritime and he was engaged in non-maritime work at the time of his injury. Claimant responds, urging affirmance of the administrative law judge's decision.

In order to be covered under the Act, a claimant must satisfy both the "situs" requirement of Section 3(a) and the "status" requirement under Section 2(3) of the Act. *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Section 3(a) provides that:

> Compensation shall be payable under this Act. . . only if the disability or death results from an injury occurring on the navigable waters of the United States (including any adjoining pier, wharf dry dock, terminal, building way, marine railway, or *other adjoining area* customarily used by an employer inloading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a)(1988)(emphasis added). In *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CIRT)(4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit, wherein this case arises, held that an area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters. To be included as an "other area" under the Act, the area must be "customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. §903(a)(1988); *see Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10 (CRT)(4th Cir. 1996). In concluding that claimant's injury had occurred on an adjoining area, the administrative law judge found that employer's

Tidewater Steel facility is bound on one side by the South Branch of the Elizabeth River, and that this part of the river is navigable. Moreover, located at the facility is a dock area from which large completed projects are shipped out by barge. Lastly, the building wherein claimant was injured is only 800 feet from the river's edge, and at least one-third of the amount of work performed at the Tidewater facility involves ship construction *See* Emp. Ex. C. Based upon the foregoing undisputed facts, we hold that the result reached by the administrative law judge is consistent with *Sidwell*; accordingly, we affirm the administrative law judge's determination that employer's Tidweater Steel facility is an adjoining area within the meaning of Section 3(a) of the Act since that facility both touches navigable waters and is customarily used for vessel construction, loading and unloading.

In so holding, we reject employer's contention that for purposes of determining situs, employer's Tidwater Steel facility should be divided into two functioning areas, maritime and non-maritime. Employer argues that since claimant's injury occurred in a portion of the Tidewater Steel facility devoted to non-maritime uses, situs should not be conferred. As the court stated in *Sidwell*, however, the

situs inquiry is concerned with whether the parcel of land adjoins navigable waters, "not the particular square foot on that parcel upon which a claimant is injured." *Sidwell*, 71 F.3d at 1140 n. 11, 29 BRBS at 144 n. 11 (CRT). Thus, situs will be conferred, even where an injury occurs on a non-maritime portion of a facility, if the overall facility upon which claimant is injured constitutes an "adjoining area" under Section 3(a).[1]

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[1] Employer's reliance on *Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992), and *Eckhoff v. Dog River Marina and Boat Works, Inc.*, 28 BRBS 51 (1994), is misplaced. In *Melerine*, the Board stated that situs is determined by the nature of the place of work at the moment of injury. In that case, the employee suffered an injury at a steel mill that was not used for any maritime purpose. In *Eckhoff*, whether claimant's injury occurred on an adjoining area was not at issue; the claimant suffered chest pains while working on a pier, an enumerated situs, and at home. The Board reversed the administrative law judge's decision to combine the pier and home into one area, and held that since claimant was injured on an area specifically enumerated in Section 3(a), the situs requirement was met. Thus, these cases are not dispositive of the issue herein. In determining whether an area is an "adjoining area" under Section 3(a), the Board looks to the nature of the place of work at the moment of injury. Accordingly, while the claimant in the instant case was injured in the non-maritime bay, the nature of the Tidewater Steel facility is maritime since at least one-third of the work performed at the facility is dedicated exclusively to vessel construction.

Employer additionally challenges the administrative law judge's determination that claimant satisfied the Act's "status" requirement. Section 2(3) defines an "employee" for purposes of coverage under the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and ship-breaker . . . ." *See* 33 U.S.C. §902(3) (1988). While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must bear a relationship to the loading, unloading, building or repairing of a vessel. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989). Moreover, an employee is engaged in maritime employment as long as some portion of his job activities constitutes covered employment. *Caputo*, 432 U.S. at 275-276, 6 BRBS at 166. Under *Caputo*, a claimant need not be engaged in maritime employment at the time of injury to be covered under the Act, as the Act focuses on occupation rather than on duties at the time of injury. *See, e.g., Dupre v. Cape Romain Contractors Inc.*, 23 BRBS 86 (1989).

In determining that claimant satisfied the status requirement, the administrative law judge found that a significant or substantial portion of claimant's regular employment included maritime work. Specifically, the administrative law judge noted that claimant, in 1993, helped fabricate both flight decks and boat cab assemblies for ships, and that claimant thereafter assisted in the installation of the complete flight decks. In challenging the administrative law judge's conclusion that claimant satisfied the "status" requirement of the Act, employer contends that claimant did not routinely or regularly perform maritime activities in his position as a welder. However, our review of the record supports the administrative law judge's conclusion that a significant portion of claimant's job activities involved vessel repair and construction, enumerated occupations under the Act. As the administrative law judge found, claimant's work for employer, at the Tidewater Steel facility and other facilities, involved in large measure the fabrication of Navy and commercial vessels. *See* Emp. Ex. A; Tr. at 21-22, 27. Indeed, employer implicitly concedes that 25 percent of claimant's job duties were maritime in nature. *See* Employer's Brief at 4, 11. Thus, the testimony and record evidence credited by the administrative law judge

establishes, at the very least, that "some portion" of claimant's job activities constituted maritime employment. *See Caputo*, 432 U.S. at 275-276, 6 BRBS at 166; *see also Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101 (CRT)(llth Cir. 1990); *Boudloche v. Howard Trucking Company*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). We therefore affirm the administrative law judge's determination that claimant's maritime welding duties were sufficient to confer coverage under Section 2(3) of the Act, as that finding is supported by substantial evidence and is in accordance with law. *See Schwalb*, 493 U.S. at 47, 23 BRBS at 99 (CRT).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring:

I concur only in the result reached by my colleagues.

JAMES F. BROWN
Administrative Appeals Judge

Decision of Administrative Law Judge Daniel A. Sarno, Jr., dated April 25, 1995: Brickhouse v. Jonathan Corporation and Crawford & Company, 29 BRBS 269 (ALJ No. 94-LHC-508).

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

Date:	**April 25, 1995**
Case No.:	**94-LHC-1330**
OWCP No.:	**5-89883**

In the Matter of:

MICHAEL C. BRICKHOUSE,
Claimant,

v.

JONATHAN CORPORATION,
Employer,

and

CRAWFORD & COMPANY,

Carrier.

Appearances: **John H. Klein, Esq.**
For the Claimant

R. John Barrett, Esq.
For the Employer

Before: **DANIEL A. SARNO, JR.**
ADMINISTRATIVE
LAW JUDGE

DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises from a claim for permanent total disability benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.* A hearing was held on January 23, 1995, at which tine all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations. The Claimant and the Employer participated in the hearing, and submitted post-

hearing briefs.

The findings and conclusions that follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

Stipulations

The parties stipulate to the following, and I find:

1. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;

2. That the parties were in an employee/employer relationship;

3. Claimant suffered an injury which arose out of and in the course of his employment;

4. That the injury occurred on August 14, 1993;

5. That there was a timely notice of injury and claim for compensation;

6. There was timely notice of controversion by the Employer;

7. There was a timely first report of the accident filed by the Employer;

8. Claimant has been temporarily totally disabled since the date of the accident;

9. Claimant's average weekly wage was $604.41 which yields a temporary total compensation rate of $402.94.

ISSUES

The issue for resolution by the administrative law judge is:

WHETHER THERE IS JURISDICTION UNDER THE LHWCA?

FINDINGS OF FACT

1. Michael Lee Brickhouse, thirty-three years old, has an eleventh grade education, has never received a GED and lives in Norfolk, Virginia (Tr. 11).

2. Claimant was injured at work in August 1993 when a 12 by 12 foot piece of steel fell on him. Claimant went to the hospital. He has not worked since that time (Tr. 16).

3. In August 1993, when Claimant was injured, he was working for Tidewater Steel (Tr. 11-12). Tidewater Steel fabricates steel for Jonathan Corporation, its corporate parent, whenever Jonathan needs it to complete a contract. Tidewater Steel is wholly owned by Jonathan Corporation (Tr. 12).[1]

4. Claimant has worked as a welder for Tidewater Steel for about four and a half years.[2] Tidewater Steel is in Chesapeake, Virginia on Glanville Drive (Tr. 12). There is a railroad track at the front of the property and the Elizabeth River (Southern Branch) is at the back of the property. The Tidewater Steel property extends from the railroad tracks all the way back to the river (Tr. 13, Cx. 1).

5. The Tidewater Steel facility in Chesapeake, Virginia sits on a 90-acre site (Tr. 29). On the site, there is an 800 by 100 foot building divided into three bays. Bays two and three are used primarily for heavy steel construction for various

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[1] Claimant was working in the third bay at the time of his injury (Tr. 25).

[2] The general duties of a welder for Employer are set out in EX-B.

contractors (Tr. 28-30). Bay one is used exclusively to construct all pre-fabs for the Jonathan Corporation shipboard projects (Tr. 28-29). A railroad spur carries steel into the building. Small completed projects are shipped out by rail or truck. Larger completed projects are shipped out by barge (Tr. 29). Barges dock at the Tidewater Steel facility, and tug boats move the barges to and from the facility (Tr. 39-40). The building is located about 800 feet from the river (Tr. 30).

6. Claimant testified that he has observed tugboat and barge traffic on the river at the Tidewater Steel facility. Claimant also testified that he has seen barges dock at Tidewater Steel. Claimant testified that be participated in loading barges at Tidewater Steel. He loaded some flight docks built by Tidewater Steel for some Navy ships onto barges for shipping to the Little Creek Amphibious base (Tr. 13, 14).

7. There is a fertilizer plant that is located across the water from Tidewater Steel. Claimant has seen cargo ships docked at the fertilizer plant. Claimant has seen ships docked on the other side of the river at the VEPCO plant (Tr. 26). He has seen ships, and tugs, and barges going up and down the river. Also just up the river, towards the mouth of the river, is

the St. Julian's Creek Navy base (CX 1). The river continues north towards downtown Norfolk where the three branches of the Elizabeth River join and then continue up north to the Chesapeake bay [sic] (Tr. 26).

8. Claimant also worked at other facilities to perform work in Tidewater's employ. These other facilities included the Little Creek Amphibious base where Jonathan had a shop (Tr. 14). Claimant did work on flight decks for ships at Little Creek. The flight decks were loaded on barges and carried to another location at Front Street in downtown Norfolk, the Jonathan Corporation main shipyard. There Claimant would generally go aboard the ships and help install the flight decks (Tr.. 14).[3] Navy ships dock at both the Front Street facility on the Elizabeth River and at the Little Creek facility (Tr. 38).

9. Claimant has also worked in Erie, Pennsylvania in a shipyard that is owned by Jonathan Corporation. He worked on ships at the Erie location (Tr. 14-15). The Erie shipyard is located on navigable water, Lake Erie (Tr. 15).

---

[3] The Front Street facility of Jonathan Corporation is on the Elizabeth River in downtown Norfolk (Tr.. 15).

10. Claimant did a variety of fabrication for the ships. Claimant testified that he spent more of his time at the Tidewater Steel facility than he did at any other location (Tr. 22). Claimant testified that he had to go where the job assignments took him. He had no choice where he worked, what he worked on, or whether he worked at all. Claimant was subject to assignment to any Jonathan or Navy location depending on the need at the time. There were days when Claimant would work at more than one work site (Tr.. 22).

11. In the year prior to his injury, Claimant worked on numerous projects (EX-A, pp. 61-65). Claimant worked on a project involving the U.S.S. Bowen which was a Navy ship. He did the flight deck work on it at the Little Creek Amphibious base location (Tr.. 17). He worked on it at the shop. The flight deck was then loaded onto a barge and vent down to the Front Street facility in Norfolk. There, he helped install it on the ship (Tr. 17). Claimant also performed work aboard the U.S.S. Beary replacing the flight decks.

12. Claimant also worked on a Randolph County civilian highway bridge project that involved replacing the girders (Tr. 18). He also performed work for the ships Juby and Johnson. He had to go aboard the ships to perform some

work in 1993. The flight decks that were fabricated at the Tidewater Steel location were also taken to the Little Creek Amphibious base where they were put on ships (Tr. 18). Claimant also had the occasion to train other welders during 1993. These were welders from NorShipCo, whom Claimant taught to weld so that they could get the certification necessary to tack weld on Navy ships (Tr. 19).

13. Claimant also worked welding girders on an Indian River Road Interstate 64 project. This was done at the Tidewater Steel facility. Claimant also did some work for a railroad bridge project from Anka, North Carolina. He welded the girders for that project at the Tidewater Steel facility (Tr. 20).

14. Claimant also performed numerous boat cab assemblies. He worked on that project for several months. It consisted of welding aluminum cabs for river boats for the Army. A cab is a shell that goes over top of a river boat (Tr. 20). The work of fabricating the cabs was done at Tidewater. Installation of the cabs onto the boats was done elsewhere (Tr. 21).

15. On August 14, 1993, the day that Claimant was

injured, the records indicate that he was working on a civilian railroad bridge that was to go to Concord, North Carolina. However, the records also indicate that during the prior two weeks, he also worked on the U.S.S. Kidd as well as boat cab assemblies (Tr. 21, 27; EX-A, pp. 64-65). On any given day Claimant could be working on a Navy project and then on a civilian, highway bridge project. Tidewater Steel determined the projects based on whatever job needed to be done first and which project it had more work (Tr. 7).[4]

Conclusions of Law

To invoke the jurisdiction of the Act, a claimant must show that he is an "employee" as defined by 33 U.S.C. Section 902(3) of the Act and that he was working in an area defined by 33 U.S.C. Section 903(a) of the Act. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977). These requirements are referred to, respectively, as "status" (section 2(3)) and "situs" (Section 3(a)).

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[4] Claimant's supervisor agreed that on any given day Claimant could be switched from a civilian job to a Navy project (Tr. 36-37).

Situs (Section 3(a))

The situs inquiry looks at the nature of the place of work at the moment of injury. Jacksonville Shipyards v. Prod, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976), vacated and remanded, 433 U.S. 904 (1977). Congress extensively amended the LHWCA in 1972, moving federal coverage ashore in an attempt to provide continuous coverage for amphibious workers. The description of "navigable waters" in the coverage provision was enlarged to encompass certain shoreward areas:

> Compensation shall be ... if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by a employer in loading, unloading repairing or building a vessel) ....

33 U.S.C. Section 903(a) (1972).

Both the Board and the courts have held that

"adjoining areas" need not be contiguous to navigable waters, nor a prescribed distance from water's edge. See Palmer v. Delta Marine Industries, 12 BRBS 957 (1980).

In the instant case, I conclude that the weight of evidence clearly establishes that the Tidewater Steel facility in Chesapeake, Virginia meets the situs requirement. The 90 acre facility is actually bounded on the backside by the South Branch of the Elizabeth River. The South Branch of the Elizabeth River flows north to Norfolk, Virginia, where it joins with two other branches of the river and enters the Chesapeake Bay. This section of the river supports ship and barge traffic. Claimant has seen ships tied up across the river at a fertilizer plant and at a VEPCO plant. Moreover, tugboats ply the river taking barges to and from the Tidewater Steel facility. These barges are loaded at that facility with pre-fabricated steel units for various shipboard projects manufactured for Jonathan Corporation, Tidewater's parent corporation. Heavy fabricated units, such as flight decks made at the Chesapeake facility are, in turn, taken by barge to such places as the Little Creek Amphibious base where they are installed on ships.

The Employer asserts that the Tidewater Steel facility

in Chesapeake, Virginia primarily manufactures non-maritime steel products which are shipped by train and truck. Even assuming that the majority of the Tidewater Steel's work is non-maritime in nature, I find that the evidence establishes that a significant amount of its work is maritime related. The evidence shows that one of the three bays at that facility is devoted exclusively to making pre-fabs for Jonathan Corporation shipboard projects. I find that this constitutes a significant amount of space to set aside exclusively for maritime related projects.

Based on the foregoing, I conclude that the evidence of record establishes claimant's injury took place in an adjoining area to a navigable waterway, the South Branch of the Elizabeth River. The adjoining area is the Tidewater Steel facility in Chesapeake, Virginia. That location is used by the Employer in loading and unloading vessels. Consequently, Claimant has established the situs requirement.

Status

Section 2 (3) of the Act provides:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker.

33 U.S.C. Section 902(d). [sic]

Under the status test of Section 2 (3), coverage under the Longshore Act is restricted to those "engaged in maritime employment." The test is satisfied if claimant's duties are "an integral part" of the longshoring, shipbuilding or ship repairing processes. Caputo, supra, 432 U.S. 249 (1977). The courts are required to look beyond the claimant's title since it is the function and nature of the duties which determine status. Caputo, supra; Maher Terminals. Inc. v.. Farrell, 548 F.2d 476 (3rd Cir. 1977)

In order for an individual's job to meet the status test under Section 2 (3) of the Act, the employee's duties for the employer must be a "necessary link in the chain of work that resulted in ships being built and repaired." Graziano v. General Dynamics, 663 F.2d 340 (1st Cir. 1981), rev'g 13

BRBS 16 (1980); Jackson Atlantic Container, 15 BRBS 473 (1983).

The courts have interpreted "maritime employment" to include all activities that have a reasonably significant relationship to traditional maritime activity. Weyerhaeuser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1975); Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs, 644 F.2d 827 (9th Cir. 1981); Jenkins v. McDermott. Inc., 734 F.2d 229 (5th Cir. 1984). Furthermore, a claimant need not be employed solely in maritime activities to invoke coverage under the Act; it is sufficient if he spends some of his tine engaged in covered activities. Smith v. Universal Fabricators, Inc. v. Louisiana Guaranty Associated Fund, 21 BRBS 83 (1988).

Moreover, a claimant need not be engaged in maritime employment at the time of the relevant injury. The Court noted that it was not Congress' intent that a claimant walk in and out of coverage. 432 U.S. 249 (1977). Thus the Court rejected the moment of injury test.

Since Caputo, it is well settled that an employee who regularly performs duties relating to maritime employment

should not be denied coverage if injured while temporarily performing some non-maritime activity. What has been at issue is how much of claimant's overall employment must be spent in maritime activity. The Board relied on the Caputo language that persons are covered if they spend "at least some of their time" in covered work in formulating its test for coverage, holding initially that an employee satisfies the status requirement if he spends "a substantial part of his employment in indisputably maritime activity." Howard v. Rebel Well Service, 11 BRBS 568 (1979), rev'd, 632 F.2d 1348, 12 BRBS 734 (5th Cir. 1980).

Turning specifically to Claimant's occupation as a welder, Employer asserts that there is nothing inherently maritime about Claimant's job duties. Moreover, Employer avers that his job does not involve an essential part of the loading or unloading process and that Claimant spent most of his time working on non-maritime land-based projects.

The weight of the evidence does not support Employer's assertion. Rather, the facts clearly show that Claimant's duties as a welder qualify as a necessary part of the shipbuilding and meet the status requirement.

First, Claimant's work as a welder for Jonathan Corporation included extensive work which was maritime in nature. In 1993, at the Tidewater Steel facility, Claimant helped fabricate flight decks for ships. Moreover, in 1993, he trained other welders in order for them to obtain certification to weld on board Navy ships. Moreover, at the Tidewater Steel facility, Claimant welded boat cab assemblies for U.S. Army river boats.

Claimant also worked at other Jonathan Corporation facilities to perform work in Tidewater's employ. These other facilities included the Little Creek Amphibious base. They have a shop there where Claimant did work on flight decks for ships. Completed flight decks were taken by barge to another location at Front Street in downtown Norfolk, the Jonathan Corporation main shipyard. Claimant would then help install the flight decks on the various ships. Claimant also worked in a shipyard in Erie, Pennsylvania. Claimant worked on the ships at the Erie facility. The Erie shipyard is located on navigable water, Lake Erie. The Front Street facility of Jonathan Corporation was on the Elizabeth River in downtown Norfolk. When Claimant went to Little Creek Amphibious base he worked on board the ships on the flight decks.

All of the foregoing work I find to have been maritime in nature. Moreover, I find that the record clearly establishes that this constituted a significant amount of Claimant's work for Employer.

The record also shows that Claimant had no choice in job assignment or location. He could be moved arbitrarily from a maritime job to a non-maritime job, depending on the needs of the Company at the time. On any given day, Claimant could be moved in and out of maritime work.

The record also shows that a portion of the work at the Tidewater Steel facility was non-maritime in nature. Indeed, on the date of his injury, Claimant was working on a non-maritime railroad bridge project at the Tidewater Steel location. However, the record clearly shows that during the previous two weeks, Claimant had worked on at least two maritime related projects involving the U.S.S. Kidd and U.S. Army boat cab assemblies. I find that the facts of this case establish that even though Claimant was not performing maritime work at the moment of injury, he is one of those employees who can walk in and out of maritime activity at the whim of his employer. I find that he is one of those

employees whom Congress clearly meant to cover in the 1972 Amendments. As such, I conclude that Claimant is still covered by status under the Act because a significant or substantial portion of his regular employment included maritime work.

Thus Claimant has established that the Tidewater Steel facility meets the situs test and that his work as a welder meets the Status test. Accordingly, claimant has established jurisdiction under the Act and is entitled to an award of benefits.

ORDER

1. The Employer is pay to Claimant compensation for temporary total disability from August 14, 1993, to the present and continuing at the rate of $402.94 per week.

2. The Employer shall receive credit for all compensation that has been paid.

3. Interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued unpaid benefits computed from the date each payment was originally

due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

4. All computations are subject to verification by the District Director.

5. Pursuant to Section 7 of the Act, the Employer shall provide such medical treatment as the nature of the Claimant's work-related disability shall require.

6. Claimant's attorney, within 20 days of the receipt of this Order, shall submit a fully-supported fee application, a copy of which shall be sent to opposing counsel, who then shall have 10 days to respond with objections thereto. See 33 U.S.C. § 702.132.

DANIEL A. SARNO, JR.
Administrative Law Judge

DAS/CCB
Newport News, Virginia

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JONATHAN CORPORATION,

Petitioner,

v. **No. 96-2457; 95-1556**

MICHAEL C. BRICKHOUSE; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

JONATHAN CORPORATION,

Petitioner,

v. **No. 97-1039; 95-1556**

MICHAEL C. BRICKHOUSE; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

FILED: June 15, 1998

ORDER

Jonathan Corporation has filed a bill of costs.

The court awards $607.40 in costs.

For the Court – By Direction

/s/ Patricia S. Connor

Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JONATHAN CORPORATION v. BRICKHOUSE

Nos. 96-2457; 95-1556

JONATHAN CORPORATION v. BRICKHOUSE

Nos. 97-1039; 95-1556

FILED: June 15, 1998

MANDATE

The judgment of this Court dated 4/23/98 takes effect today.

PATRICIA S. CONNOR

CLERK

(2)

No. 98-241

FILED
NOV 4 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

MICHAEL C. BRICKHOUSE,

Petitioner,

vs.

JONATHAN CORPORATION, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JONATHAN CORPORATION

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31 pp

QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err in determining that Petitioner was not injured on a covered situs for purposes of jurisdiction under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 903(a) where Petitioner's injury occurred in a steel fabrication plant which was not an "other adjoining area" the "*raison d'etre*" of which is its use in connection with navigable waters?

PARTIES TO THE PROCEEDING

The Respondent has no parent companies and no nonwholly owned subsidiaries.

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33 U.S.C. § 903(a) ..... i, 4

STATEMENT OF THE CASE

This matter involves a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (hereinafter "LHWCA" or the "Act"). The matter was heard before Administrative Law Judge Daniel A. Sarno, Jr., of the United States Department of Labor, to determine whether there was jurisdiction under the LHWCA with respect to the injuries suffered by Petitioner, Michael C. Brickhouse (hereinafter "Brickhouse" or "Petitioner").

Petitioner began working for Tidewater Steel (a division of Jonathan Corporation) as a welder in 1988. Tidewater Steel's main function is heavy steel construction. It bids on jobs from any kind of contractor and also does steel fabrication work for the Jonathan Corporation.

Tidewater Steel's plant is located in Chesapeake, Virginia. There is a railroad track at the front of the property as well as a road. At the back of the property is the Elizabeth River. The facility is located near a residential neighborhood, Social Services Office and a school, as well as a Virginia Power facility. According to the physical survey of the Tidewater Steel property, the main portion of the Tidewater Steel building is approximately 1,000 feet from the Elizabeth River. Petitioner was actually injured even farther from the river, approximately 1,400 feet away.

The physical structure at Tidewater Steel is a building approximately 800 feet long and 100 feet wide. This building is divided into three separate bays, which for all practical purposes function as two separate buildings. Bay I is used to fabricate steel for arguably maritime related projects. Bay II and Bay III are used for other non-maritime, heavy steel

fabrication. In addition, there are approximately ninety acres surrounding the building which are used for storage unrelated to maritime construction.

Most of the steel that is fabricated at Tidewater Steel is brought to the facility by railroad. Lighter pieces of steel are brought in by truck. Barges and the waterways are *never* used to receive steel into the plant. The railroad line that is used to bring the steel to the facility actually comes directly into the building, all the way through the two bays that are used for non-maritime construction. All of the products are shipped out by rail or truck, except for the very largest items which are, occasionally, sent by barge. There is no crane on the property for loading and unloading barges.

Petitioner was employed as a welder. The vast majority of his work was on bridge construction. Very occasionally, Petitioner worked on steel fabrication for Jonathan's projects.

On August 14, 1993, Petitioner was working in Bay III, welding a piece of steel. He was using a crane to hold up the large piece of steel. Another welder needed to use the crane, and disconnected it from Petitioner's piece. When Petitioner returned to work on the piece of steel, it fell on him.

On the date that he was injured, Petitioner was working on steel construction for a railroad bridge. (Jt. App. 36). The construction, when completed, was to be shipped out by rail. (Jt. App. 36).

The claim was heard before Administrative Law Judge Daniel A. Sarno who found that the Petitioner had satisfied the situs and status requirements for establishing jurisdiction under the LHWCA, and awarded benefits. Jonathan then appealed this decision to the Benefits Review Board which affirmed the Decision of the Administrative Law Judge.

Jonathan then requested review before the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit reversed, relying on its earlier decision in *Sidwell v. Express Container Services*, 71 F.3d 1134 (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996). The court found that the fact that the Elizabeth River ran contiguous to the plant's property did not satisfy the situs requirement, as "the steel fabrication plant where Brickhouse was injured was not a facility, the '*raison d'etre* of which is its use in connection' with the nearby navigable waters." (App. 19, citing *Sidwell* at 1139). The court stated:

> The plant was not connected to the Elizabeth River in any way necessary to make workers in the plant longshoreman working at the water's edge. Indeed, the plant was almost 1,000 feet from the water's edge, and it was not "customary" for the plant's workers to move between land and water in any regular way. They remained in the plant fabricating maritime and non-maritime components, just as they would have done if the plant were located at any inland site.

(App. 18-19).

Because the Court concluded that Petitioner was not injured on a covered situs, they did not address his "status", that is, "the more complex question of whether Brickhouse was injured while engaging in maritime employment." (App. 19-20).

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI EXAGGERATES THE CONFLICT BETWEEN THE CIRCUITS.

The Petitioner correctly points out that a number of circuits have considered the situs aspect of jurisdiction under the Longshore and Harbor Workers' Compensation Act. However, the tests utilized by the various circuits are not as different as the Petitioner suggests and, it is submitted, the differences that do exist do not amount to a matter of national significance.

The crux of the dispute centers on the 1972 amendments to the LHWCA and the "situs" requirement for jurisdiction under the Act. Assuming that an injured employee has requisite maritime "status," as defined in 33 U.S.C. § 902(3), jurisdiction will only attach when the injury occurs on a specific "situs." The Act limits coverage to:

> [a]ny injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or *other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel*).

33 U.S.C. § 903(a). (emphasis added). Because the injury to the Petitioner herein, and the other cases cited, did not occur upon navigable waters or one of the enumerated areas, the question revolves around the limits of the phrase "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel."

In recent years, "other adjoining area" situs has been addressed by many of the circuit courts. In *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978), the Ninth Circuit held that:

> In order to further Congress' goal of uniform coverage, the phrase "adjoining area" should be read to describe a *functional relationship* that does not, in all cases, depend upon physical contiguity. Consideration should be given to the following facts, among others, in determining whether or not a site is an "adjoining area" under § 903(a): the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to use in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

Id. at 141 (emphasis added).

In *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), an *en banc* Fifth Circuit utilized a less specific "totality of the circumstances" test:

> All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes.

Id. at 514. In further defining "adjoining area," that court noted that "[s]o long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, employee's injury can come within the LHWCA." *Id.* Further, "[t]he perimeter of an area is defined by function. The 'area' must be one

customarily used by an employer in loading, unloading, repairing or building a vessel." *Id.* at 515. The court went on to examine the facts of the particular case and looked to factors very similar to the ones enumerated by the Ninth Circuit:

> [I]n this case, the . . . gear room was not clearly outside the waterfront area customarily used by employers for gear rooms. . . . The ALJ found that the gear room operations were part of the ongoing, overall loading process . . . He found that the gear room was "in the most desirable position for servicing the docks" . . . and that the gear rooms of most stevedores were not on the docks proper. . . . The gear room was as close to the dock as was feasible. . . . Not only does the area **adjoin the navigable waterway**, but the gear room itself has a sufficient nexus to the waterfront.

Id. at 515 (emphasis added).

In *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991), a panel of the Second Circuit utilized a very similar test for "other adjoining area" situs. The *Triguero* court cited the *Brady-Hamilton* test with approval and also looked to whether the situs of the injury was "an integral part of the shipyard despite the distance of the situs from the waterway." *Id.* at 100-101. Thus, the Second Circuit essentially adopted the *Brady-Hamilton* "functional" approach.

In *Brooker v. Durocher Dock & Dredge,* 133 F.3d 1390 (11th Cir. 1998), *cert. granted,* 67 USLW 3097 (September 29, 1998), the Eleventh Circuit denied jurisdiction in a case where the claimant was injured during the construction of a seawall, despite the fact that a seawall was in and of itself the "boundary between land and navigable waters." The court held

that the seawall was not a "pier" as defined by Section 3(a) of the LHWCA and, additionally but almost tangentially, was not an "other adjoining area" as it was "not a place of traditional maritime activity." *Id.* at 1394.[1]

In *Nelson v. American Dredging Co.*, 143 F.3d 789 (3d Cir. 1998), the Third Circuit was asked to determine whether a bulldozer operator working on a beach reclamation project was covered under the LHWCA. The beach reclamation project was on the shores of the Atlantic Ocean, and therefore clearly adjoined a navigable waterway. What was at issue, as in the present case, was whether the injury occurred in an adjoining area which was "customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." The court ultimately determined that the claimant had, in fact, been injured under a covered situs but, more importantly for the purposes of this matter, utilized both a geographic and functional approach in requiring that the beach be customarily used for traditional maritime activity in order to meet the "other adjoining area" situs requirement. *Id.* at 796-797.

The Fourth Circuit also adopted an "other adjoining area" situs test which examines function and location. *Sidwell v. Express Container Services*, 71 F.3d 1134 (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996). The *Sidwell* court examined the plain meaning of the statute and found that, as to "adjoining"

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1. This Court's grant of certiorari in *Brooker* would, at first blush, appear to argue for similar consideration herein, as both cases do involve situs and an interpretation of Section 3(a). However, the Eleventh Circuit's primary focus in that decision was whether a seawall was a "pier," a narrow matter not at issue herein. The discussion of whether the place of injury was an "other adjoining area" was almost an afterthought, without detailed analysis. It's resolution should not affect the rationale of the instant matter involving an injury to a steel fabrication worker 1000 feet from the water's edge.

navigable waters, the area must be contiguous or otherwise touch such waters. While that language may at first glance appear more restrictive than the other circuits' formulations, the differences are not significant. The Fourth Circuit took care to point out that

> it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a plaintiff is injured. . . . the physical distance is not decisive. . . . The test is whether the situs is within a contiguous shipbuilding area which adjoins the water.

Sidwell, 71 F.3d at 1140, n.11, quoting *Alabama Drydock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir. 1977), *cert. denied*, 434 U.S. 903 (1977).

Having determined the meaning of adjoining, the *Sidwell* court instructed that "other" and "area" must be defined with reference to the preceding language of qualification. Therefore, an "other adjoining area", as to which coverage extends, must be *like* a pier, wharf, drydock, terminal, building way, or marine railway; that is, a discrete shoreside structure or facility. *Id.* Finally, the area must be customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel, that is an area the "very *raison d'etre* is its use in connection with navigable waters." *Sidwell* at 1139.

The Fourth Circuit Court of Appeals revisited the "other adjoining area" situs question in the present matter. At issue in this case is not the contiguity of navigable water, but the function or the "nature" of the adjoining area. (App. 16). The *Brickhouse* court noted that the "controlling principles" on this issue were laid down in *Sidwell*. (App. 16).

Addressing those principles in more detail, the *Brickhouse* court stated:

> The landward extension [of LHWCA jurisdiction] is a seamless annexation of land to navigable waters for purposes of LHWCA coverage. But the annexation does not include all adjacent land. The statute *extends 'navigable waters' only to land relating to work on those waters*, specifically enumerating adjoining piers, wharfs, dry docks, terminals, building ways and marine railways. These are facilities customarily used by longshoreman in loading and unloading ships and in repairing or building them. The link between the navigable waters and the land side facilities is thus established under the statute by (1) *the contiguity of the land side facility and navigable water*, and (2) *the affinity of the landside facility to longshoreman's work on ships.*
>
> Anticipating that its enumeration of landside facilities might not be complete, Congress also incorporated a catchall term in § 903(a) to include any 'other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.' But again, Congress did not abandon its legislating principle of connecting this 'other area' to the work of longshoremen on navigable waters. The 'other area' annexed to navigable waters of the Act must again be 'adjoining' the water and must again be linked to the traditional longshoremen's work on the water. The 'other area' must be for the *loading or unloading of cargo* onto ships in navigable waters

> or for the '*repairing, dismantling, or building' of those ships.*

(App. 14-15), (citations omitted) (emphasis added).

The Fourth Circuit then applied the law to the facts of the present matter. The court determined that Petitioner was fabricating steel parts in a steel fabrication plant which was not a pier, wharf, dry dock, terminal, building way or marine railway. Further, it was not a similar type of facility that "fits the catch all provision." The court found the following facts to be important in its determination that the Tidewater Steel facility was not an "other adjoining area" "customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel":

> While at the plant, *the employees' work did not routinely take them from within the plant, onto adjoining water, and back again into the plant.* On the contrary, when at the plant, their work kept them in the plant to fabricate steel components that were shipped from the plant, usually by rail or truck, either to an inland sight or to a ship on navigable waters for installation. *The very fact that it was necessary for the components to be shipped from the plant before their installation, whether by ship or not, provides the fact that insulates the plant from navigable waters and distinguishes Brickhouse's work location from that of a traditional longshoreman's workplace at the water's edge.* When Brickhouse worked on ships, which he occasionally did, he traveled by land to the shipyard where he then installed the fabricated parts. During these times, he was undoubtedly on a situs covered by the LHWCA. *But while at the Tidewater Steel*

> *plant, his situs was no different than it would have been at any steel fabrication plant anywhere in the land.*

(App. 17-18). (emphasis added).

Thus, although the Tidewater Steel facility was located on the shores of the Elizabeth River, that fact was not determinative of situs. **Nor would that fact have determined situs in any other circuit in the nation.** Petitioner correctly points out that the Third Circuit in *Nelson, supra,* disagreed with the *Sidwell* definition of "area," however, that definition is not the issue in the present matter. Here, the Fourth Circuit looked to the "nature" of the situs in question, that is, whether it is "customarily used by an employer in loading, unloading, repairing or building a vessel." The circuits that have examined the issue, as outlined above, have required the adjoining area to have the appropriate *function* in order to establish situs. The adjoining area must be "customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." *Brady-Hamilton* at 141; *Textports* at 515; *Triguero* at 100-101; *Brooker* at 1394, *Nelson* at 796-797.[2]

On that point, the *Nelson* court agreed with the *Sidwell* and *Brickhouse* interpretation of the Act. The beach in *Nelson* had to be used for a traditional maritime activity, just as the steel fabrication plant did, in order to have the requisite situs.

In addition, it should be noted that the very factors which the Petitioner argues show that the Fourth Circuit rule is "harsh"

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2. The First and Sixth Circuits have addressed the issue only briefly in their decisions. *See Stockman v. John T. Clark & Son*, 539 F.2d 264 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *Rizzi v. Underwater Construction Corp.*, 84 F.2d 199 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 302 (1996).

and "rigid" (see Petitioner's Brief at 15-16) are similar to the factors considered by the Ninth Circuit Court of Appeals in *Brady-Hamilton* and by the Fifth Circuit in *Textports*: suitability, proximity and feasibility to maritime use.

Thus, like the Second, Third, Fifth, Ninth and Eleventh Circuits, the Fourth Circuit situs test examines function, as well as location. While the Fourth Circuit perhaps creates a clearer line than that set forth by other circuits, the situs test does not subject longshoremen in Virginia to an intolerably different scope of coverage than longshoremen in Louisiana, California or New York.

Additionally, this identical issue — whether the Fourth Circuit's decision in *Sidwell* created a split in the circuits — was litigated in *Sidwell* itself and answered with a denial of certiorari by this Court. *Sidwell, cert. denied,* 518 U.S. 1028 (1996). The instant matter is directly derivative of the *Sidwell* rationale and, with minor exceptions, the national "situs" landscape remains the same. Petitioner points to no rash of claim denials or demands by the lower courts for uniformity since the denial of certiorari in *Sidwell* and it is thus evident that the fine distinctions noted do not rise to the level of national importance.

II.

THE DECISION OF THE FOURTH CIRCUIT IN THIS CASE IS CONSISTENT WITH PRIOR DECISIONS OF OTHER PANELS OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Prior to *Sidwell* and *Brickhouse*, the Fourth Circuit had considered "other adjoining area" situs in two cases, without ever developing a comprehensive test. *Newport News Shipbuilding & Drydock Company v. Graham*, 573 F.2d 167

(4th Cir. 1978), *cert. denied*, 439 U.S. 979 (1978); *Humphries v. Director, Office of Workers' Compensation Programs*, 834 F.2d 372 (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988). In *Sidwell*, the Fourth Circuit acknowledged these prior decisions, noted the lack of a "touchstone for all future LHWCA jurisdictional questions" and declared, "we now decide how it should be determined in this circuit whether the situs requirement of the LHWCA is satisfied." *Sidwell*, 71 F.3d at 1138.

Similarly, the *Brickhouse* court referred to the *Humphries* case specifically, and noted that it was "consistent" with the principles established by the present matter. (App. 16).

Thus, the Fourth Circuit itself has addressed whether its prior decisions were determinative of the situs issue and decided they were not. An analysis of *Graham* and *Humphries* confirms that, prior to *Sidwell*, there was no comprehensive situs test in the Fourth Circuit. *Graham* contains a brief, one paragraph discussion of the issue. The *Graham* court found that two sites, a submarine shop and a foundry, 120 and 3,000 feet from the water's edge satisfied the situs test because they were an "integral part" of the shipyard. *Graham*, 573 F.2d at 169.

In *Humphries*, the Fourth Circuit engaged in a much more lengthy discussion of situs and examined the *Brady-Hamilton* and *Texports* approaches. Ultimately, however, the court *expressly declined* to establish a comprehensive test and simply recited a number of factors which resulted in a conclusion that the accident in that case did not occur on a maritime situs. *Id.* at 375. Among the factors considered by the court were that the accident occurred over a mile from the Terminal, along a "public highway which did not connect any portions of [the employer's] operations or traverse continuous or contiguous terminal areas." *Id.* In addition, the restaurant where the injury

occurred was "separated from the Elizabeth River and the nearest maritime terminal by a residential neighborhood." *Id.*

Thus, contrary to the Petitioner's assertions, the Fourth Circuit's decision in the present matter is not in conflict with its prior decisions.

III.

THE FOURTH CIRCUIT'S INTERPRETATION OF THE LHWCA IS IN ACCORDANCE WITH THIS COURT'S DECISIONS.

Petitioner's argument that the Fourth Circuit has failed to construe the LHWCA in accordance with this Court's established principles is without merit. In *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), this Court directed that, in a statutory construction case, "[t]he controlling principle . . . is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Id.* at 476.

The Fourth Circuit, in both *Brickhouse* and *Sidwell,* has followed this directive and adhered to the plain language of the Act in making its situs determinations.

Moreover, the Fourth Circuit has not failed to "liberally construe" the Act, as Petitioner asserts, but has consistently followed the plain language of the Act, keeping the burden of proof where it is supposed to be, on the claimant, as established by this Court's decision in *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 280-286 (1994).

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 98-241

In the Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL C. BRICKHOUSE, PETITIONER

v.

JONATHAN CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioner was injured at a steel fabrication plant located 800 feet from the water on a 90-acre facility that borders a navigable river. The plant produces components for both ships and non-maritime projects, most of which are delivered by rail but some of which are transported by barge from the facility's dock. The question presented is whether the plant is a situs covered under Section 3(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 903(a).

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-241

MICHAEL C. BRICKHOUSE, PETITIONER

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JONATHAN CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 142 F.3d 217. The decision and order of the Benefits Review Board (Pet. App. 21-31) is unreported. The decision and order of the administrative law judge (Pet. App. 32-51) is reported at 29 Ben. Rev. Bd. Serv. (MB) 269.

JURISDICTION

The court of appeals entered its judgment on April 23, 1998. The petition for a writ of certiorari was filed on July 20, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act) provides compensation for work-related injuries that cause the disability or death of covered employees. 33 U.S.C. 908, 909. To be covered by the Act, an injured employee must meet two requirements. The first, the status requirement, is that the employee be engaged in maritime employment.[1] The second, the situs requirement, is that the injury have occurred on a maritime situs. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 264-265 (1977). This case concerns the situs requirement, set out in Section 3(a) of the Act, which specifies that a disability or death is compensable only if it:

> results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. 903(a).

2. Petitioner Michael C. Brickhouse was employed as a welder by Tidewater Steel Company (Tidewater), whose parent corporation is respondent Jonathan Corporation (Jonathan). Pet. App. 4, 36. Petitioner was injured in August 1993 while performing his duties at Tidewater's steel fabrication facility, when a 12-foot square piece of steel fell on him. *Id.* at 4.

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[1] Section 2(3) of the Act defines "employee" (with certain exceptions not relevant here) as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. 902(3).

The Tidewater facility occupies a 90-acre site that is bordered on one side by the Elizabeth River, a navigable waterway. Pet. App. 6, 36. The facility has a dock for loading barges. *Id.* at 6. All of the steel that the facility receives arrives by rail or truck. *Ibid.* Most of the products fabricated at the facility are shipped out by rail or truck, although particularly large ones are shipped out by barge. *Id.* at 6, 37.

The fabrication building at the site is located 800 feet from the water and is divided into three bays. Pet. App. 5, 36-37. One of the bays is used to fabricate components for Jonathan's shipyard projects, and the other two are used to fabricate steel for bridges and other non-maritime projects. *Ibid.*

Most of petitioner's working time was spent on non-maritime projects, and, at the time of his injury, petitioner was working in a non-maritime bay of the plant. Pet. App. 5, 36-37. During the course of his employment, however, petitioner performed welding on components for installation on ships. *Id.* at 5, 39-41. In addition, he loaded barges at the Tidewater facility and traveled to Jonathan's shipyards to help install components. *Id.* at 37-38.

3. Petitioner sought benefits under the LHWCA for total disability arising out of his injury at the Tidewater facility. The only disputed issues were whether petitioner met the Act's situs and status requirements. Pet. App. 35, 41. After a hearing, an administrative law judge (ALJ) ruled in petitioner's favor on both issues. *Id.* at 50.

In determining situs, the ALJ emphasized that "[t]he 90 acre [Tidewater] facility is actually bounded on the backside" by navigable water. Pet. App. 43. The ALJ emphasized as well that one of the three bays at Tidewater's fabrication building is devoted to maritime

projects and that barges are loaded at the facility with pre-fabricated units to be taken to shipboard projects. *Ibid.* The ALJ concluded that, even assuming the majority of Tidewater's work is non-maritime, the evidence established that a significant amount of its work is maritime-related. Because the Tidewater facility is an area adjoining navigable waters that is used for loading and unloading vessels, the ALJ ruled that the facility is a covered situs. *Id.* at 44.[2]

4. On December 20, 1996, the Benefits Review Board affirmed. App., *infra*, 1a-10a.[3] The Board held that the ALJ's situs ruling was consistent with the Fourth Circuit's decision in *Sidwell* v. *Express Container Services, Inc.*, 71 F.3d 1134 (1995), cert. denied, 518 U.S. 1028 (1996), which the Board characterized as holding that an "area" "adjoin[s]" navigable waters within the meaning of Section 3(a) only if it is contiguous with those waters, and it constitutes an "other * * * area" covered by that provision only if it is customarily used in loading, unloading, repairing, dismantling, or building a vessel. App., *infra*, 5a-6a. The Board held that the ALJ properly concluded that the Tidewater facility meets those requirements in light of his findings that the facility is bounded on one side by a navigable waterway and has a dock area from which large completed objects are shipped by barge;

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[2] In determining status, the ALJ concluded that petitioner's welding duties were "a necessary part of * * * shipbuilding," Pet. App. 47, and that a substantial part of petitioner's regular employment included maritime employment. *Id.* at 49-50. Having concluded that petitioner met both the situs and status requirements, the ALJ awarded total disability benefits. *Id.* at 50.

[3] Because the copy of the Benefits Review Board decision appended to the petition is incomplete, we have reprinted the decision in its entirety in an appendix to this brief.

petitioner was injured in a building only 800 feet from the water's edge; and at least one third of the work performed at the facility involves ship construction. *Id.* at 6a.[4]

5. The court of appeals reversed on the situs issue. Pet. App. 1-20. The court held that LHWCA coverage exists only if there is a link between navigable waters and "land side facilities" consisting of "(1) the contiguity of the land side facility and navigable water, and (2) the affinity of the land side facility to longshoremen's work on ships." *Id.* at 14. The court explained that "the kinds of property [*e.g.*, piers, wharfs, dry docks] that the LHWCA enumerates are 'discrete structures or facilities, the very raison d'etre of which is [their] use in connection with navigable waters.'" *Id.* at 16 (quoting *Sidwell*, 71 F.3d at 1138-1139). The court noted that an "other * * * area" is covered by Section 3(a)'s catchall provision only if it adjoins navigable waters and is customarily used for the loading or unloading of vessels or their repair, dismantling, or building. *Id.* at 15.

The court of appeals observed that a steel fabrication plant is not one of the structures specifically enumerated in Section 3(a). The court further concluded that the Tidewater plant is not "a similar type of facility that fits the [Section's] catchall provision." Pet. App. 17. The court emphasized that the employees' work does not take them routinely from within the plant onto adjoining water and back again but rather keeps them in the plant to fabricate parts that are usually shipped by rail or truck to an inland site or elsewhere. *Id.* at 17-

[4] The Board also upheld the ALJ's determination that petitioner met the LHWCA's status requirement. App., *infra*, 9a. Accordingly, the Board affirmed the ALJ's situs and status rulings and upheld the award of benefits.

18, 19. The court concluded that the very fact that components are shipped from the plant before their installation "insulates the plant from navigable waters and distinguishes [petitioner]'s work location from that of the traditional longshoreman's workplace at the water's edge." *Id.* at 18. Moreover, the court observed that, although petitioner occasionally worked on ships, he traveled by land to the shipyards where he then installed fabricated parts. *Ibid.*

The court acknowledged that the plant's property is contiguous with navigable waters, but concluded that such contiguity is "simply fortuitous." Pet. App. 18. The court noted that the plant is "almost a thousand feet" from the water's edge and reiterated that the plant's workers do not customarily move between land and water but rather remain in the plant as they would if the plant were located at any inland site. *Id.* at 18-19. The court also emphasized that the plant does not serve ships at the water's edge or build or repair them at its barge dock. *Id.* at 19. Moreover, the court determined that it is not meaningful that components are on rare occasions shipped by barge from Tidewater's dock because such transport would be relevant only if it were the customary method of shipment and if Tidewater's employees were longshore workers who customarily loaded barges at the facility. *Ibid.* Accordingly, the court held that petitioner was not injured on a covered situs and consequently reversed the award of benefits. *Id.* at 19-20.

ARGUMENT

The decision of the court of appeals rests on the particular facts of this case and does not conflict with any decision of this Court or of any other court of

appeals. Review by this Court is therefore not warranted.[5]

1. As the court of appeals recognized, the question whether the steel fabrication plant at which petitioner was injured is a covered situs depends upon whether it is part of an area adjoining navigable waters that is "customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." 33 U.S.C. 903(a).[6] The Board concluded that the facility is a covered situs because it abuts navigable waters and is customarily used for the construction, as well as loading and unloading, of vessels. In reaching that conclusion, the Board emphasized that the facility is bounded on one side by a navigable river and that the building at the facility in which petitioner was injured is only 800 feet from the water's edge. App., *infra*, 6a; see also Pet. App. 36-37 (ALJ findings) ¶¶ 5-7. The Board further emphasized that a least one-third of the work at the facility involves fabrication of components for ships, and that large completed components are shipped out by barge from the facility. App., *infra*, 6a; see also Pet. App. 37 (ALJ finding) ¶ 6.

In contrast, the court of appeals concluded that the fabrication plant lacks the connection to navigable waters necessary to render it a LHWCA situs. See Pet. App. 19 ("the steel fabrication plant * * * was not a facility, the 'raison d'etre of which is its use in connection' with the nearby navigable waters") (quot-

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[5] The Director of the Office of Workers' Compensation did not participate in the proceedings before the Benefits Review Board or the court of appeals.

[6] There is no dispute that the plant is not an "adjoining pier, wharf, dry dock, terminal, building way, [or] marine railway." 33 U.S.C. 903(a).

ing *Sidwell* v. *Express Container Services, Inc.*, 71 F.3d 1134, 1139 (4th Cir. 1995), cert. denied, 518 U.S. 1028 (1996)). The court acknowledged that the plant's property adjoins navigable water but concluded that the fact that the facility is contiguous with the water is "fortuitous." Pet. App. 18. The court of appeals reasoned that the plant is "almost a thousand feet from the water's edge, and it [is] not 'customary' for the plant's workers to move between land and water in any regular way." *Ibid.* The court stressed that, although the plant "serve[s] ships at other locations by manufacturing components," ships are not repaired or built at the facility's dock, and components are only rarely, rather than customarily, shipped by barge from the dock. *Id.* at 19.

The court of appeals correctly recognized that the central question in this case is whether the fabrication plant is part of an area "customarily used" for loading, unloading, or building vessels. Petitioner argues that the court of appeals erred because it gave insufficient weight to the facts that the fabrication plant constructs components for ships and that the components are, if sufficiently large, loaded onto barges at the facility's dock for transport to ships or shipbuilding sites. The court of appeals, however, viewed that transport as rare and found the record insufficient to permit an inference that shipment by barge or loading onto barges is "customary." Pet. App. 19.

The court of appeals also emphasized that Tidewater's workers do not regularly traverse between land and water. *Id.* at 17-18, 19. The "customary" uses of an adjoining area that trigger the statute's coverage do not necessarily entail that action. Cf. *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 77-80 (1979) (LHWCA coverage is not limited to workers who "could have been assigned"

to work over navigable waters; worker may be engaged in "maritime employment" even though he performs his duties solely on land). Contrary to petitioner's contention (Pet. 16), however, we do not read the court of appeals to have held that routine or customary movement between the water and an adjoining area is always necessary in order for that area to be a covered situs. Rather, the court noted the absence of such movement as one of several factors indicating that the fabricating plant in this case was not part of a covered situs.[7]

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[7] Although the court of appeals noted that the plant is "almost a thousand feet from the water's edge," the court did not conclude that the plant is not part of an area that adjoins water. Rather, the court concluded that the plant does not "customar[il]y" require close proximity to navigable water. Pet. App. 18-19. Thus, we do not read the decision as establishing an unduly narrow contiguity test for determining whether a putative situs adjoins navigable waters. Cf. LHWCA Program Memorandum No. 58, at 13-14 (Aug. 10, 1977) ("it does not defeat coverage of a shipbuilder's injury that the precise location where it occurred—for example, a fabrication shop—does not itself adjoin the water; it suffices if the overall *area* within which it occurred (generally a shipyard) adjoins the water") (emphasis in original); *id.* at 10-11. Although petitioner equates the questions whether a situs has a physical connection to navigable waters and whether it has a functional connection (Pet. 10-16), the two inquiries are distinct. The issue in this case is whether the plant has the necessary functional connection to navigable waters, while the issue in *Sidwell* and *Parker* v. *Director, Office of Workers Compensation Programs*, 75 F.3d 929 (4th Cir.), cert. denied, 117 S. Ct. 58 (1996), overruled on other grounds, *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers Compensation Programs*, 519 U.S. 248 (1997), was whether the facilities at issue in those cases had the necessary physical connection. See *Sidwell*, 71 F.3d at 1135 (cargo container repair facility, located eight-tenths of a mile from the terminal and separated from it by various businesses and residential developments, does not adjoin navigable waters); *Parker*, 75 F.3d at 931-932 (repair facility, located five

The court of appeals' decision in this case turns on a relatively unusual confluence of facts. The application of law to facts does not ordinarily present a question warranting this Court's review. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (Court "do[es] not grant a certiorari to review evidence and discuss specific facts"). There is no issue of general importance in this case to warrant a departure from that usual rule.

2. Contrary to petitioner's contention (Pet. 16-22), the Fourth Circuit's decision in this case does not directly conflict with that of any other court of appeals. In *Alford* v. *American Bridge Division, United States Steel Corporation*, 642 F.2d 807, 813-816, modified on other grounds, 655 F.2d 86 (1981), cert. denied, 455 U.S. 927 (1982), the Fifth Circuit held that an 86-acre American Bridge facility, which bordered a navigable river and had previously been a shipyard, was a covered LHWCA situs. See also *id.* at 809. Its primary function since it had ceased being a shipyard was to fabricate steel components for vessels, as well as for bridges, steel buildings, and power plants. *Ibid.* When large steel components were fabricated for vessels, they were loaded onto ocean-going barges for delivery to one of two shipyards. *Ibid.*

In ruling that the facility met the Section 3(a) situs test, the court emphasized that the facility's location on the water was "essential" to the company's business based on the testimony of a company witness that there was no other means besides barges to transport the large modules. 642 F.2d at 814. The court rejected the

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miles from terminal and one mile from nearest navigable water, does not adjoin navigable waters, even though employees regularly traveled between facility and waterfront and performed repair work at both places).

argument that "shipbuilding" did not take place at the facility because the entire vessel was not constructed there and held that construction of modular components was an integral part of the ongoing process of shipbuilding. See *id.* at 815. Thus, the court concluded "that the geographic location, the plant history and the 'on-going operation' of American Bridge in fabricating component parts of vessels, meets the situs test." *Id.* at 816.

Although there is tension between *Alford* and this case, there is no square conflict. In *Alford*, the court concluded that the facility's location on water was not "merely incidental" but necessary in order to transport the large modules the company produced. 642 F.2d at 814. In contrast, the court of appeals in this case concluded that the Tidewater plant's location near water was a fortuity and that it was only "on rare occasions" that components were shipped by barge. Pet. App. 18, 19. Both decisions, however, viewed the functional connection between the facility's activities and its location on navigable waters as relevant to the determination whether the facility was a covered situs. In addition, although the opinion in this case suggests that the Fourth Circuit might well take a different view than the *Alford* court on whether construction of modular components is shipbuilding, see *id.* at 19, the court of appeals here did not expressly address that issue.

Nor is there a conflict between the Fourth Circuit's holding in this case and the statement of the Ninth Circuit in *Perkins* v. *Marine Terminals Corporation*, 673 F.2d 1097, 1101-1102, cert. denied, 455 U.S. 927 (1982), that a facility need not be used exclusively for maritime purposes in order to be a covered situs. Because the court of appeals here relied on a variety of

factors in concluding that the Tidewater plant is not a covered maritime facility, without identifying any one factor as critical, we do not read the decision as standing for the proposition that majority maritime work is the sine qua non of an LHWCA situs. Indeed, the decision expresses no disagreement with Fourth Circuit precedent that a foundry shop at a shipyard, at which 73% of the production involved non-maritime items, was a covered situs. *Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, 573 F.2d 167, 169 (4th Cir.), cert. denied, 439 U.S. 979 (1978).[8]

Petitioner's contention (Pet. 18-19) that the decision in this case conflicts with the Third Circuit's decision in *Dravo Corporation* v. *Maxin*, 545 F.2d 374 (1976), cert. denied, 433 U.S. 908 (1977), is also without merit. The court there held that a structural steel shop, where workers spent 15% of their time on non-maritime work and 85% on maritime work and which was located at a facility on an island in the Ohio River, was an LHWCA situs. 545 F.2d at 376. The steel shop was the only area at the facility that performed non-maritime work, and the employee seeking compensation had been injured at the shop while burning steel plates that would become

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[8] Petitioner also argues (Pet. 22-23) that this Court should grant certiorari because the decision in this case conflicts with *Newport News* and the Fourth Circuit's similar holding in *Humphries* v. *Director, Office of Workers Compensation Programs*, 834 F.2d 372 (1987), cert. denied, 485 U.S. 1028 (1988). There is no conflict, however, because, as explained above, the court of appeals here did not hold that a situs must be used exclusively for maritime purposes to be covered under the Act. Review is not warranted, in any event, to correct possible inconsistencies among decisions within the Fourth Circuit. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

bottom decks of barges fabricated by the company at the facility. *Ibid.*

In upholding situs on those facts, the court rejected the argument that the covered situs extended only to the place of assembly of the vessel and that the structural shop's location 2000 feet from the river precluded it from being an area adjoining navigable waters. *Dravo*, 545 F.2d at 381. The court noted that the facility as a whole adjoined navigable water, that the great majority of the work performed in the shop was related to shipbuilding and repair, and that there was no delineation of the work into shipbuilding and non-shipbuilding functions. Accordingly, the court concluded that "the structural steel shop * * * [wa]s an integral part of * * * [the] shipbuilding operations at the complex." *Ibid.*

Thus, the record evidence that shipbuilding was customarily performed at the putative situs was stronger in that case than in this one. Most obviously, the "great majority of the work performed [at the putative situs wa]s related to shipbuilding or ship repair," 545 F.2d at 381, and ships were constructed at the facility, *id.* at 376, a fact that might well have changed the outcome under the Fourth Circuit's analysis here. See Pet. App. 19 (noting that no ships were built, repaired or dismantled at the pier at Tidewater's facility).[9]

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[9] Nor is there any conflict with *Nelson* v. *American Dredging Company*, 143 F.3d 789 (3d Cir. 1998), as petitioner suggests (Pet. 20). The essential difference between the cases lies in the courts' characterization of the facts before them. In *Nelson*, the employer's operations in the area consisted of unloading sand delivered through a pipeline from a dredge and positioning the sand on the beach for reclamation purposes. The court concluded that the unimproved beach was an area customarily used by an employer

In sum, there is no conflict among the courts of appeals on governing legal principles relevant to this case. Review by this Court of the fact-dependent determination that the plant at which petitioner was injured is not a situs covered by the LHWCA is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1998

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for loading and unloading a vessel. *Id.* at 796-797. By contrast, in this case, the court of appeals concluded that loading of barges was rare, and the fabrication facility was therefore not customarily used by an employer for loading and unloading. Pet. App. 19. Although the *Nelson* court disagreed with the Fourth Circuit's holding in *Sidwell*, *supra*, that a covered situs must be a structure or facility, see 143 F.3d at 797, that rule was not the basis for the Fourth Circuit's decision in this case.

APPENDIX

(Department of Labor Seal)

U.S. Department of Labor

Benefits Review Board
800 K Street, N.W.
Washington, D.C. 20001-8001

BRB NOS. 95-1556 AND 96-1278

MICHAEL C. BRICKHOUSE, CLAIMANT-RESPONDENT

v.

JONATHAN CORPORATION AND
CRAWFORD & COMPANY, EMPLOYER/CARRIER-
PETITIONERS

DECISION AND ORDER

Appeals of the Decision and Order - Awarding Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor, and the Order Designating Authorized Treating Physician of B.E. Voultsides, District Director, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer, Black, Meredith & Marin), Norfolk, Virginia, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order - Awarding Benefits (94-LHC-1330) of Administrative Law Judge Daniel A. Sarno, Jr., and the Order Designating Authorized Treating Physician (Case No. 5-89883) of District Director B.E. Voultsides rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant suffered a work-related injury on August 14, 1993, during the course of his employment with Tidewater Steel, a wholly owned subsidiary of employer, when a piece of steel fell on him. Claimant underwent surgery to his coccyx and has not returned to work since the date of the accident.

The facts involved in this case are not in dispute. Claimant's injury occurred at Tidewater Steel's facility in Chesapeake, Virginia. The facility sits on a 90 acre site adjoining the South Branch of the Elizabeth River. Large completed projects are shipped out by barges which dock at the facility. The building in which claimant's injury occurred is about 800 feet from the river's

edge and is divided into three bays; Bays 2 and 3 are used for steel construction for various contractors, while Bay 1 is devoted solely to employer's shipboard construction contracts. Claimant's accident occurred in Bay 3 while claimant was working on a non-maritime railroad bridge project. Claimant's overall work as a welder, however, involved both maritime and non-maritime construction. He testified that he did most of his work at the Tidewater Steel facility, but was often assigned to perform shipboard construction at other employer and Navy locations; for example, in 1993, a significant amount of claimant's work involved fabrication of flight decks for Navy ships.

The only issue before the administrative law judge was jurisdiction. In his Decision and Order, the administrative law judge found that employer's Tidewater Steel facility is bounded on one side by navigable water, and that a significant amount of the work done at the facility is maritime related. Accordingly, the administrative law judge concluded that claimant's injury occurred in an "adjoining area" under Section 3(a) of the Act, 33 U.S.C. §903(a) (1988), and that the situs requirement of Section 3(a) has thus been satisfied. The administrative law judge next found that since a significant amount of claimant's work for employer was maritime in nature, claimant established the status element under Section 2(3) of the Act, 33 U.S.C. §902(3) (1988). Accordingly, the administrative law judge found that claimant established jurisdiction under the Act and awarded temporary total disability benefits. 33 U.S.C. §908(b).

Employer filed its Notice of Appeal of the administrative law judge's Decision and Order on May 25, 1995. BRB No. 95-1556. Employer filed a second appeal

in this case on June 26, 1996; this subsequent appeal concerned the district director's Order Designating Authorized Treating Physician. BRB No. 96-1278. In an Order dated July 31, 1996, the Board consolidated these appeals, holding that, in light of the consolidation, the one year period of review provided by Public Law No. 104-134 will run from June 26, 1996. On September 3, 1996, employer moved to withdraw its appeal of the district director's order, BRB No. 96-1278. Section 802.401(a), 20 C.F.R. §802.401(a), of the Board's implementing regulations provides that at any time prior to the issuance of a decision by the Board, the petitioner may move that the appeal be dismissed. Consistent with this section, we hereby grant employer's motion and dismiss its appeal of the district director's Order Designating Authorized Treating Physician, BRB No. 96-1278, with prejudice. 20 C.F.R. §802.401(a).

Consequently, the only appeal pending in this matter is employer's appeal of the administrative law judge's Decision and Order, BRB No. 95-1556. Arguably, since employer filed a motion to withdraw the consolidated case prior to September 12, 1996, the original May 25, 1995 appeal date should apply, in which case the administrative law judge's decision could be administratively affirmed pursuant to Public Law No. 104-134, since this appeal was more than one year old on September 12, 1996. However, in view of the consolidation of the two appeals and our order stating that employer's second appeal extended the period of review until June 26, 1997, we will consider the issues raised by employer in its appeal of the administrative law judge's decision.

In its appeal of the administrative law judge's decision, employer contends that the administrative law judge erred in finding situs and status. Specifically,

employer asserts that since claimant's injury occurred in a portion of the facility devoted to non-maritime uses, claimant was not injured in an "adjoining area" under Section 3(a). Employer further argues that the status test was not met since the vast majority of claimant's work was non-maritime and he was engaged in non-maritime work at the time of his injury. Claimant responds, urging affirmance of the administrative law judge's decision.

In order to be covered under the Act, a claimant must satisfy both the "situs" requirement of Section 3(a) and the "status" requirement under Section 2(3) of the Act. *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Section 3(a) provides that:

> Compensation shall be payable under this Act . . . only if the disability or death results from an injury occurring on the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or *other adjoining area* customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a) (1988) (emphasis added.). In *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT) (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit, wherein this case arises, held that an area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters. To be included as an "other area" under the Act, the area must be "customarily used by employer in loading, unloading, repairing, dismantling,

or building a vessel." 33 U.S.C. § 903(a) (1988); *see Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10 (CRT) (4th Cir. 1996).

In concluding that claimant's injury had occurred on an adjoining area, the administrative law judge found that employer's Tidewater Steel facility is bound on one side by the South Branch of the Elizabeth River, and that this part of the river is navigable. Moreover, located at the facility is a dock area from which large completed projects are shipped out by barge. Lastly, the building wherein claimant was injured is only 800 feet from the river's edge, and at least one-third of the amount of work performed at the Tidewater facility involves ship construction. *See* Emp. Ex. C. Based upon the foregoing undisputed facts, we hold that the result reached by the administrative law judge is consistent with *Sidwell*; accordingly, we affirm the administrative law judge's determination that employer's Tidewater Steel facility is an adjoining area within the meaning of Section 3(a) of the Act since that facility both touches navigable waters and is customarily used for vessel construction, loading and unloading.

In so holding, we reject employer's contention that for purposes of determining situs, employer's Tidewater Steel facility should be divided into two functioning areas, maritime and non-maritime. Employer argues that since claimant's injury occurred in a portion of the Tidewater Steel facility devoted to non-maritime uses, situs should not be conferred. As the court stated in *Sidwell*, however, the situs inquiry is concerned with whether the parcel of land adjoins navigable waters, "not the particular square foot on that parcel upon which a claimant is injured." *Sidwell*, 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11 (CRT). Thus, situs will be

conferred, even where an injury occurs on a non-maritime portion of a facility, if the overall facility upon which claimant is injured constitutes an "adjoining area" under Section 3(a).[1]

Employer additionally challenges the administrative law judge's determination that claimant satisfied the Act's "status" requirement. Section 3(a) defines an "employee" for purposes of coverage under the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and ship-breaker. . . ." *See* 33 U.S.C. §902(3) (1988). While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must bear a relationship to the loading, unloading, building,

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[1] Employer's reliance on *Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992), and *Eckhoff v. Dog River Marina and Boat Works, Inc.*, 28 BRBS 51 (1994), is misplaced. In *Melerine*, the Board stated that situs is determined by the nature of the place of work at the moment of injury. In that case, the employee suffered an injury at a steel mill that was not used for any maritime purpose. In *Eckhoff*, whether claimant' s injury occurred on an adjoining area was not at issue; the claimant suffered chest pains while working on a pier, an enumerated situs, and at home. The Board reversed the administrative law judge's decision to combine the pier and home into one area, and held that since claimant was injured on an area specifically enumerated in Section 3(a), the situs requirement was met. Thus, these cases are not dispositive of the issue herein. In determining whether an area is an "adjoining area" under Section 3(a), the Board looks to the nature of the place of work at the moment of injury. Accordingly, while claimant in the instant case was injured in the non-maritime bay, the nature of the Tidewater Steel facility is maritime since at least one-third of the work performed at the facility is dedicated exclusively to vessel construction.

or repairing of a vessel. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989). Moreover, an employee is engaged in maritime employment as long as some portion of his job activities constitutes covered employment. *Caputo*, 432 U.S. at 275-276, 6 BRBS at 166. Under *Caputo*, a claimant need not be engaged in maritime employment at the time of injury to be covered under the Act, as the Act focuses on occupation rather than on duties at the time of injury. *See, e.g., Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

In determining that claimant satisfied the status requirement, the administrative law judge found that a significant or substantial portion of claimant's regular employment included maritime work. Specifically, the administrative law judge noted that claimant, in 1993, helped fabricate both flight decks and boat cab assemblies for ships, and that claimant thereafter assisted in the installation of the complete flight decks. In challenging the administrative law judge's conclusion that claimant satisfied the "status" requirement of the Act, employer contends that claimant did not routinely or regularly perform maritime activities in his position as a welder. However, our review of the record supports the administrative law judge's conclusion that a significant portion of claimant's job activities involved vessel repair and construction, enumerated occupations under the Act. As the administrative law judge found, claimant's work for employer, at the Tidewater Steel facility and other facilities, involved in large measure the fabrication of Navy and commercial vessels. *See* Emp. Ex. A; Tr. At 21-22, 27. Indeed, employer implicitly concedes that 25 percent of claimant's job duties were maritime in nature. *See* Employer's Brief at 4, 11.

Thus, the testimony and record evidence credited by the administrative law judge establishes, at the very least, that "some portion" of claimant's job activities constituted maritime employment. *See Caputo*, 432 U.S. at 275-276, 6 BRBS at 166; *see also Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990); *Boudloche v. Howard Trucking Company, Inc.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). We therefore affirm the administrative law judge's determination that claimant's maritime welding duties were sufficient to confer coverage under Section 2(3) of the Act, as that finding is supported by substantial evidence and is in accordance with law. *See Schwalb*, 493 U.S. at 47, 23 BRBS at 99 (CRT).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

/s/ ROY P. SMITH
ROY P. SMITH
Administrative
Appeals Judge

I concur:

/s/ NANCY S. DOLDER
NANCY S. DOLDER
Administrative
Appeals Judge

BROWN, Administrative Appeals Judge, concurring:

I concur only in the result reached by my colleagues.

/s/ JAMES F. BROWN
JAMES F. BROWN
Administrative
Appeals Judge